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SHOULD CRIMINAL JURIES GIVE REASONS FOR THEIR
VERDICTS?: THE SPANISH EXPERIENCE AND THE
IMPLICATIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS
DECISION IN *TAXQUET V. BELGIUM*

STEPHEN C. THAMAN*

INTRODUCTION

On January 13, 2009, the European Court of Human Rights (ECtHR) ruled in *Taxquet v. Belgium* that the conviction of a man for the murder of a government minister and attempted murder of his companion violated the defendant's right to a fair trial under Article 6 of the European Convention of Human Rights (ECHR) because the jury did not give reasons for its verdict.¹ On November 16, 2010, the Grand Chamber of the ECtHR (*en banc* court) affirmed the decision, but did not call into question the institution of jury trials.²

The criminal jury, with its roots in ancient England, has traditionally been thought of as the conscience of the community, and its decisions have possessed inherent legitimacy: the jury "spoke the truth" through its *verdict*,³ which needed no other justification.⁴ The verdict possessed a legitimacy akin to that of a democratic election or parliamentary vote because the common law historically required the verdict be the result of a unanimous vote—even when the results appeared, on occasion, to be irrational.⁵

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1. *Taxquet v. Belgium*, App. No. 926/05, (Eur. Ct. H.R., Jan. 13, 2009) available at <http://www.echr.coe.int> [hereinafter *Taxquet*].

2. *Taxquet v. Belgium* (GC), App. No. 926/05, (Eur. Ct. H.R., Nov. 16, 2010) available at <http://www.echr.coe.int> [hereinafter *Taxquet* (GC)].

3. The word *verdict* comes from Norman-French *verdit* where *ver* meant "true" and *dit*, "saying," i.e. truth-saying. THE POCKET OXFORD DICTIONARY 1021 (8th ed. rev. 1996). For an opinion that the term *verdict* (German, *Wahrspruch*) is "euphemistic" and was an attempt to transpose the unerring correctness of all decisions of the absolute monarch to that of the popular jury, see Reinhard Moos, *Die Begründung der Geschworenengerichtsurteile*, 132 JURISTISCHE BLÄTTER 73, 76 (2010).

4. Verdicts of guilt in the United States were final upon their pronouncement, and judgments of guilt following a verdict of a jury were not subject to appeal until 1889, when Congress allowed for appeals in capital cases. *United States v. Scott*, 437 U.S. 82, 88 (1978).

5. Thus Thomas Jefferson remarked once in a letter to a friend: "Were I called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making of

Amicus curiae in the *Taxquet* case made a similar argument before the ECtHR.⁶ Juries in the U.S., England, and Wales return general verdicts which merely indicate whether the defendant(s) are “guilty” or “not guilty” of the charged crime(s) (or possible lesser-included offenses). The logic of these verdicts can only be divined by studying the evidentiary record, and the instructions given by the judge on the law and their application in the particular case.⁷

In the civil law realm,⁸ to which Belgium belongs, self-legitimizing popular juries do not have the centuries-long and uninterrupted pedigree which they enjoy in the common law world. Lay participation in the form of jury courts or *Schöffengerichte* vanished on the European continent, for all practical purposes, in the late Middle Ages, when inquisitorial written procedures directed exclusively by professional judges replaced them.⁹ But while professional judges were in firm command of the criminal investigation, and determining the defendant’s guilt and punishment, they were not allowed to judge freely according to their conscience as would a jury. Such decisions were rendered in accordance with formal rules of evidence, which required either a confession or, for instance, the testimony of at least two male, upstanding Christians who witnessed the crime.¹⁰ Since this was

them.” JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 30 (2000).

6. For the position of the Belgian government, see *Taxquet* (GC), *supra* note 2, at § 68. The Irish government, in its *amicus* brief, also indicated that the jury “inspired confidence among the Irish people who were attached to it for historical and other reasons.” *Id.* at § 76. Indeed, in 1999, the ECtHR decided that a judgment based on a Danish jury’s verdict required no further reasons. *Id.*, at §§ 71, 89 (citing *Saric v. Denmark*, App. No. 31913/96, (Eur. Ct. H.R. Feb. 2, 1999)).

7. Thus, in *Taxquet*, the government of the United Kingdom argued that the judge not only explains the elements of the charged crimes but also the “chain of reasoning that should be followed in order to reach a verdict based on the jury’s findings of fact.” *Id.* at § 74. The Irish government repeated this argument, and also noted that the Irish judge summarizes the evidence for the jury, draws its attention to evidence of importance, and explains how to evaluate circumstantial evidence, among other things. *Id.* at § 77.

8. Here I refer foremost to Continental Europe, whose legal roots are in Roman law, Catholic canon law, and French codified law, and its former colonies, such as Latin America, and many African and Asian countries. For a classic work comparing the civil law and common law systems, see JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (3d ed. 2007).

9. *Schöffen* were well-respected men of the community who, working with a professional judge, the prince or political head of the collective, decided legal disputes. They played a major role in Charlemagne’s Holy Roman Empire yet were gradually replaced by professional judges when the written inquisitorial system displaced the accusatory oral and public trials that were part of old Germanic tradition. On the role and importance of *Schöffengerichte*, see A. ESMEIN, *HISTORY OF CONTINENTAL CRIMINAL PROCEDURE WITH SPECIAL REFERENCE TO FRANCE* 32 (1913); JOHN HENRY DAWSON, *A HISTORY OF LAY JUDGES* 94–110 (1960); VON THOMAS WEIGEND, *DELIKTSOPFER UND STRAFVERFAHREN* 88 (1989).

10. On the “formal rules of evidence” and their roots in the Catholic canon law, see WEIGEND, *supra* note 9, at 89 and ESMEIN, *supra* note 9, at 259. On the formal rules of evidence and the notion that they were, despite their attempt to secure a more rational basis for conviction, just as irrational as

seldom the case, torture was permitted to induce the required confession. Such confessions became the “queen of evidence.”¹¹ Under this arrangement, the only sanctuary for the judge to freely evaluate evidence was in determining whether there was sufficient circumstantial evidence to allow torture of a non-confessing suspect,¹² or in determining whether the evidence was sufficient to impose a “special punishment” or *poena extraordinaria* on a suspect who did not give into torture and therefore could not be convicted.¹³

Only with the French Revolution and the Enlightenment critique of the brutality of the confession-based inquisitorial procedure did the English common law gain influence on the continent. The French introduced trial by jury and abolished the formal rules of evidence, allowing the jury to decide based on its *intime conviction* and made its decision, in cases of acquittal, final.¹⁴ During the course of the nineteenth century, most other European countries followed the French lead and introduced trial by jury, but the new continental jury did not return a simple, unanimous general verdict of “guilty” or “not guilty,” as did its English and American counterparts. Rather, these juries returned an itemized special verdict or “question list” which addressed the basic elements of the charged crimes and any possible excuses or justifications individually. A majority vote was required to prove each item as well as the ultimate question of guilt.¹⁵

Although the French accepted the English jury’s freedom to freely evaluate evidence according to their conscience or “inner conviction” (*in-*

early Medieval ordeals, see LUIGI FERRAJOLI, DIRITTO E RAGIONE: TEORIA DEL GARANTISMO PENALE 112–14 (5th ed. 1998).

11. On the interrelation of the formal rules of evidence and the *reginam probationam* of the confession in seventeenth century Germany, see GUNTER DEPPENKEMPER, BEWEISWÜRDIGUNG ALS MITTEL PROZESSUALER WAHRHEITSERKENNTNIS: EINE DOGMENGESCHICHTLICHE STUDIE ZU FREIHEIT, GRENZEN UND REVISIONSGERICHTLICHER KONTROLLE TATRICHTERLICHER ÜBERZEUGUNGSBILDUNG 171–81 (2004).

12. *Id.* at 154–56.

13. On the punishment of those who could not be proved guilty under the formal rules of evidence, so-called “suspicion punishments” (*Verdachtsstrafen*), as a type of *poena extraordinaria* and the roots of free judicial appraisal of the evidence, see JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIENT RÉGIME 47–59 (1977).

14. On the history of the introduction of jury in France, see ESMEIN, *supra* note 9, at 409–19. On the abolition of the formal rules of evidence and the introduction of the concept of *intime conviction*, see *id.* at 516. On *intime conviction* and the finality of French jury acquittals, see STEPHEN C. THAMAN, COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH 199 (2d ed. 2008).

15. On the French special verdict, see Bernard Schnapper, *Le jury français aux XIX et XX ème siècles*, in THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY: 1700–1900 168, 178–90 (Antonio Padoa Schioppa ed., 1987). I have written extensively on the question lists used in Russia and Spain, both in the nineteenth century, and in their modern jury systems, which were revived in the 1990’s. See Stephen C. Thaman, *The Nullification of the Russian Jury: Jury-Inspired Reform in Eurasia and Beyond*, 40 CORNELL INT’L L. J. 355, 379–99 (2007); Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 HASTINGS INT’L & COMP. L. REV. 241, 321–53 (1998).

time conviction), the question-list form of a verdict enables the bench to see the logic of how the jury decided the case. Thus, the verdict enabled the court to draft a written judgment based on the jury's factual answers. The court could then determine the legal qualification of the essential facts which the jury found had been proved.¹⁶ American courts have, by and large, rejected special verdicts because they allow the judge too much control over how the jury logically assesses the facts and the law in the case.¹⁷

Yet the same Enlightenment thinkers who pushed for adopting the jury and free evaluation of the evidence were just as adamantly opposed to professional judges doing anything but subsuming the facts into the law. As Montesquieu famously said: "the judges of the nation are nothing, as we have said, but the mouth which pronounces the words of the law; inanimate beings who can moderate neither its force, nor its rigor."¹⁸

This "mechanistic" approach of the Italo-French Enlightenment to the role of the judge¹⁹ gradually took hold in Germany, where a diametrically opposed notion of the judge had developed during the eighteenth century. According to these early Enlightenment thinkers, a judge should act as a creative savior of imperfect laws through his wise application of principles of natural law, and should nullify unwise laws and acquit despite the word of the law.²⁰ The ambivalence about the role of the professional judge on the European continent grew as the formal rules of evidence were junked and the notion of *intime conviction* or "free evaluation of the evidence" was introduced along with trial by jury.²¹

Jury courts have never been the default jurisdiction for criminal cases on the European continent. In most countries, they are reserved for the trial of only the most serious felonies, such as murder or perhaps rape, and polit-

16. On the question lists and the role of the judge in drafting a judgment in the modern Russian and Spanish jury systems, see Stephen C. Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, in *WORLD JURY SYSTEMS* 338-47 (Neil Vidmar ed., 2000).

17. WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* 1192-93 (5th ed. 2009).

18. MONTESEQUIEU, *1 DE L'ESPRIT DES LOIS* 301 (GF-Flammarion ed., 1979). In Italy, Enlightenment thinkers Cesare Beccaria and Gaetano Filangieri shared Montesquieu's views and sought to make the judge's role as mechanistic and automatic as possible. WILFRIED KÜPER, *DIE RICHTERIDEEN DER STRAFPROZESSORDNUNG UND IHRE GESCHICHTLICHEN GRUNDLAGEN* 51-57 (1967).

19. *Id.* at 51.

20. An example was Christian Thomasius (1655-1726), who wrote that judges should refuse to enforce the laws punishing witchcraft. KÜPER, *supra* note 18, at 39-42.

21. France introduced jury trials in 1791 and all other European countries, with the exception of the Netherlands and Luxemburg, followed suit, in fits and starts, throughout the nineteenth century. The first code of criminal procedure of the unified Germany in 1871 included trial by jury. The Russian Empire introduced jury trials in 1864 and after several aborted attempts, Spain finally introduced jury trials in its code of criminal procedure of 1888. Neil Vidmar, *The Jury Elsewhere in the World*, in *WORLD JURY SYSTEMS*, *supra* note 16, at 429-32.

ical crimes or press crimes.²² For example, the 1877 Code of Criminal Procedure of the united German Empire provided jury trials only for the most serious felonies punishable by in excess of five years imprisonment. A panel of five professional judges heard cases punishable by up to five years of imprisonment, and the revived mixed court or *Schöffengericht*²³—made up of one professional judge and two lay assessors who decided all issues of fact and law—heard only minor misdemeanors or infractions punishable by no more than three months jail.²⁴ In all of the non-jury courts, the judge was required to decide whether the facts were proved based on his “inner conviction,” as would a juror. While this idea was consistent with the thoughts of early Enlightenment thinkers in Germany, the more-restricted “mechanistic” notion of the judge propagated by Montesquieu and Beccaria was gradually gaining in popularity and was defended by Anselm Feuerbach²⁵ and also by C.J.S. Mittermaier.²⁶

Although the introduction of the jury and its ability to freely evaluate the evidence according to its conscience or inner conviction was the catalyst for eliminating the formal rules of evidence on the European continent, there was a reluctance to allow professional judges to decide freely without being bound by rules of evidence of some kind. A compromise was suggested in an anonymous writing by the great German jurist Savigny in 1846 when he was the Prussian Minister of Justice. He suggested that judges would nonetheless be bound in their evaluation of the facts to the “laws of thought (*Denkgesetze*), experience and human knowledge.”²⁷ In the same year, a Berlin ordinance instituted the requirement that the judge give reasons for his decisions:

[T]he judge as trier of fact must from now on decide whether the defendant is guilty or not guilty, based on a careful appraisal of all evidence for the prosecution and the defense according to his free conviction, re-

22. On the jurisdiction of the nineteenth century Spanish jury court, see Thaman, *Spain Returns*, *supra* note 15, at 246–48, 259–60.

23. The *Schöffengericht* was first introduced in Baden-Württemberg in 1818, with a composition of two professional judges and three lay judges. CHRISTOPH RENNIG, *DIE ENTSCHEIDUNGSFINDUNG DURCH SCHÖFFEN UND BERUFSRICHTER IN RECHTLICHER UND PSYCHOLOGISCHER SICHT* 33–34 (1993).

24. Markus Dirk Dubber, *The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology*, 43 AM. J. COMP. L. 227, 235 (1995).

25. KÜPER, *supra* note 18, at 38–39.

26. For a critique of the idea of “declaring legally-educated judges to be jurors” by allowing them to decide by a “free evaluation of the evidence” because this would put too much power into their hands, see C.J.S. MITTERMAIER, *DAS DEUTSCHE STRAFVERFAHREN: ERSTE ABTHEILUNG* 222 (2d ed. 1832).

27. DEPPENKEMPER, *supra* note 11, at 205–210.

sulting from the essence of the trial held in his presence. He is, however, obligated to give the reasons, which guided him, in the judgment.²⁸

What the Germans called “free evaluation of the evidence” (*freie Beweiswürdigung*) gradually became infused with a meaning which radically diverged from the French *intime conviction* which was criticized as being irrational: it was characterized as “reasoned conviction” (*conviction raisonnée*).²⁹ Damaška has characterized the French notion of *intime conviction* as “romantic” and compared it with the German approach whereby the judge no longer had the “license to disregard the extralegal canons of valid inference.”³⁰

German scholars always disputed the legitimacy of the jury court, with its unfettered ability to determine facts, even when it was firmly entrenched as the court of jurisdiction for serious felonies. Nevertheless, critics typically claimed the superiority of the mixed court for, *inter alia*, two reasons: it made the separation of questions of fact (for the jury) and law (for the professional panel of judges) unnecessary, and it allowed for the professional component of the court to supply the reasons for the judgment.

Throughout the nineteenth and into the twentieth century, the classic jury (with its special, majority verdicts) remained the typical court for the trial of murders and other serious felonies. However, the mixed court (*Schöffengericht*), in which professional and lay judges deliberate collectively—thus allowing the professional judge to write a reasoned judgment—began to win adherents in other countries.³¹ But it was only with the rise of Bolshevism and Fascism in Europe that the anti-jury forces were able to deal a blow to the English transplant. The Bolsheviks eliminated the jury in 1917 and substituted it with a mixed court similar in form (one professional judge and two lay assessors) to the one in the 1877 German code of criminal procedure.³² The German jury was transformed into a mixed court in 1924 by decree of the Minister of Justice, supposedly as a cost-

28. Regulation (Verordnung) of July 17, 1846, reprinted in ANDREAS GEIPEL, HANDBUCH DER BEWEISWÜRDIGUNG 11 (2008). On the influence of Savigny in this reform, see DEPPENKEMPER, *supra* note 11, at 209–10. For an argument attributing the origin of the requirement of reasons to “authoritarian Enlightenment thinking in Germany and Austria,” see ENRIQUE VÉLEZ RODRÍGUEZ, LA MOTIVACIÓN Y RACIONALIDAD DEL VEREDICTO EN EL DERECHO ESPAÑOL Y EN EL DERECHO NORTEAMERICANO 142 (2007). Note: all translations from the foreign language texts into English were made by the author, unless otherwise indicated.

29. DEPPENKEMPER, *supra* note 11, at 208.

30. MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 21 (1997).

31. In France, the influential jurist Gabriel Tarde pushed for mixed courts as early as 1877. RICHARD VOGLER, A WORLD VIEW OF CRIMINAL JUSTICE 236–37 (2005). France also experimented with mixed courts in its African colonies as well. Schnapper, *supra* note 15, at 226–27.

32. Stephen C. Thaman, *The Resurrection of Trial by Jury in Russia*, 31 STAN. J. INT’L L. 61, 65–67 (1995).

saving measure during an economic depression.³³ The Italian Fascists in 1922, Portuguese dictator Salazar in 1927, and Generalissimo Franco in Spain in 1939 also eliminated the jury, with the Italians converting it into a mixed court. In 1941 the Vichy regime in France also converted its jury into an extended mixed court.³⁴ By the end of World War II, the European jury was only to be found in its Anglo-French form in Belgium, Austria, some of the Swiss Cantons, Denmark, and Norway.³⁵ The fact that totalitarian regimes could not tolerate a jury system should not be surprising; a jury could resist pressures from the executive-branch and refuse to convict defendants with the exercise of its “inner conviction,” and overturning a jury acquittal in most jurisdictions was difficult. But why didn’t countries like Germany, France, or Italy return to the classic jury when they established classic democracies after World War II? The Italians, for one, were clear that the constitutional requirement of reasoned judgments seemed to be an impediment to returning to the classic jury model.³⁶

The jury has made a slight comeback in recent years in democratizing countries which had finally emerged from totalitarian or authoritarian regimes. Spain included trial by jury in its democratic constitution of 1978 and finally passed legislation to implement the constitutional command in 1995.³⁷ Russia introduced jury trials in 1993 in nine of its regions and territories, and from 2001 through 2009 expanded the institution to its entire realm.³⁸ Both countries introduced the European model based on question lists, majority verdicts, and appealability of acquittals.³⁹ In 2010, the Republic of Georgia introduced an American-style jury with general unanimous verdicts and non-appealability of acquittals.⁴⁰ The break-up of the

33. RENNIG, *supra* note 23, at 57–59.

34. Vidmar, *supra* note 21, at 429–32.

35. John D. Jackson & Nikolay P. Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 COLUM. J. EUR. L. 83, 95 (2006).

36. Ennio Amodio, *Giustizia Popolare, Garantismo e Partecipazione*, in 1 GIUDICI SENZA TOGA. ESPERIENZE E PROSPETTIVE DELLA PARTECIPAZIONE POPOLARE AI GIUDIZI PENALI 47 (Ennio Amodio ed., 1979). The Italian Constitution provides that “reasons must be given for all judicial decisions.” (“Tutti i provvedimenti giurisdizionale devono essere motivati.”). Art. 111, par. 6 Costituzione (It.), available at http://www.governo.it/Governo/Costituzione/2_titolo4.html.

37. Thaman, *Spain Returns*, *supra* note 15, at 241–42.

38. Thaman, *Nullification*, *supra* note 15, at 357–58. The first jury trial in Chechnya was heard in 2010. *Glava Verkhovnogo suda Chechny: Prisiazhnym Meshaiut Osobnosti Mentaliteta*, RIANOVOSTI (Russ.), Feb. 2, 2011, available at <http://www.rian.ru/interview/20110202/329462447.html>.

39. The ECtHR lists seven European countries with jury systems which use question lists in lieu of a simple general verdict relating to the charged crime: Austria, Belgium, Ireland, Norway, Russia, Spain and Switzerland. *Taxquet* (GC), *supra* note 2, at § 49.

40. Section 231(4) Code of Criminal Procedure of the Republic of Georgia (copy on file with the author). The ECtHR lists the European countries which still have a “traditional” jury system as Austria, Belgium, Georgia, Ireland, Malta, Norway (only on appeal), Russia, Spain, Switzerland (the Canton of

Soviet Union has led to a spate of new constitutions and codes of criminal procedure with many of the newly independent republics flirting with the classic jury (such as Ukraine, Armenia, Azerbaijan, Belarus, Kyrgyzstan), and Kazakhstan has introduced an expanded mixed court patterned after the post-1941 French model (nine lay judges, two professional judges), which it calls a jury court.⁴¹ Otherwise, many of the former Soviet Republics as well as the new democracies in the former socialist Eastern Europe have maintained a mixed court similar to that employed by the Germans and the Soviets.⁴² According to the ECtHR, fourteen members of the Council of Europe have never had, or have abolished, lay participation altogether.⁴³

Thus, in Europe there is a conflict between the tradition of the classic jury—which may decide according to their conscience or *intime conviction*—and the requirement that judgments be reasoned to prevent arbitrariness and to ensure an effective right to appeal. Can a jury of twelve (as in Belgium, Russia, or England and Wales) or nine (as in Spain) plausibly articulate the reasons why they determined certain facts to have been proved? If they can, must they vote and reach the required majorities in relation to the reasons for their verdict, as well as on the answers to the questions contained in the special verdict?

In this article I will first discuss the Belgian jury system and the decision in *Taxquet v. Belgium* and then explore to what extent a requirement of reasoned judgments will affect the survival of European juries. Here I will focus on Spain, where the jury is required to give reasons for its verdicts, and where a lively high-court jurisprudence has developed addressing the quality and sufficiency of jury reasons. Finally, in conclusion, I will suggest that it might be appropriate for jury courts in the United States to in some way justify their decisions of guilt, in order to minimize the amount

Geneva (only until January 1, 2011), and the United Kingdom (England, Wales, Scotland, and Northern Ireland). *Taxquet* (GC), *supra* note 2, at § 47.

41. Stephen C. Thaman, *The Two Faces of Justice in the Post-Soviet Legal Sphere: Adversarial Procedure, Jury Trial, Plea-Bargaining and the Inquisitorial Legacy*, in CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT. ESSAYS IN HONOUR OF PROFESSOR MIRJAN DAMAŠKA 112–13 (John Jackson et al. eds., 2008).

42. The ECtHR has called this the “collaborative court model of lay adjudicators.” *Taxquet* (GC), *supra* note 2, at § 44. The members of the Council of Europe with a collaborative court are: Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Liechtenstein, Monaco, Montenegro, Norway, Poland, Portugal, Serbia, Slovakia, Slovenia, Sweden, Macedonia, and Ukraine. *Id.* at § 46.

43. Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Cyprus, Latvia, Lithuania, Luxembourg, Moldova, the Netherlands, Romania, San Marino, and Turkey. *Id.* at § 45.

of completely innocent persons who have been sentenced to death or other long prison sentences based on flawed evidence.⁴⁴

I. THE BELGIAN JURY AND THE DECISION IN *TAXQUET V. BELGIUM*

A. *Particularities of the Belgian Jury and Criminal Procedure*

When Belgium became independent of the Netherlands, Article 98 of its 1831 Constitution proclaimed: "The jury shall be constituted for all serious crimes and for political and press offences."⁴⁵ The jury was seen as the touchstone of a new democratic state. A law passed in 1930 broadened jury participation, and gave the system the form it has today: a twelve-person jury sitting with a three-judge panel, which deliberates separately on the issues of fact and guilt.⁴⁶ The Constitution of 1994, which contained the same language as Article 98 of the 1831 Constitution, was amended in 1999 to make an exception for "press offenses motivated by racism or xenophobia."⁴⁷

The professional bench submits to the Belgian jury a list of questions which the jury must answer. According to Article 337 of the Belgian Code of Criminal Procedure (CCP-Belgium),⁴⁸ the questions must be based on the text of the indictment.⁴⁹ The principle questions deal with the elements of the charged crimes, but questions may also be asked which address justifications, excuses, and aggravating or mitigating factors, as long as the issues were raised during the trial.⁵⁰ Pursuant to Article 341 of the CCP-Belgium, the bench, after having formulated the questions, gives them to the jury along with the indictment, and "the reports establishing the offense and other documents in the investigative file, with the exception of the written statements of the witnesses."⁵¹

44. Here I will follow, to a certain extent, in the footsteps of John Jackson, who some years ago, suggested that common law countries might also require reasons for verdicts of guilt. John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477, 517 (2002).

45. 1831 Const. art. 98 (Belg.)

46. *Taxquet* (GC), *supra* note 2, at § 22. See Philip Traest, *The Jury in Belgium, Lay Participation in the Criminal Trial in the XXIst Century*, 72 REVUE INTERNATIONALE DE DROIT PÉNAL [REV. INT'L DR. PÉNAL] 27–50 (2001). Jurors must be between the age of thirty and sixty years and know how to read and write. *Taxquet*, *supra* note 1, at § 18.

47. *Taxquet* (GC), *supra* note 2, at § 23.

48. Code D'Instruction Criminelle [C.I.CR.] art. 337 (Belg.), available at <http://www.ejustice.just.fgov.be>.

49. *Taxquet* (GC), *supra* note 2, at § 26.

50. *Id.* at § 27.

51. *Id.* at § 28.

Prior to 2009, before the jury would deliberate, the foreperson read the following instruction to the jury, which is also displayed in large type in the jury room for all to see:

The law does not ask jurors to account for how they reached their personal conviction; it does not lay down rules on which they are to place particular reliance as to the completeness and sufficiency of evidence; it requires them to ask themselves questions, in silence and contemplation, and to discern, in the sincerity of their conscience, what impression has been made on their rational faculties by the evidence against the defendant and the submissions of the defence. The law does not tell them: "You will hold every fact attested by this number of witnesses to be true"; nor does it tell them: "You will not regard as sufficiently established any evidence which does not derive from this report, these exhibits, this number of witnesses or this many clues"; it simply asks them this one question which encompasses the full scope of their duties: "are you inwardly convinced?"⁵²

The bench, composed of three judges, may set aside a verdict and set the case for retrial before another jury if it unanimously finds that the jury, without violating its procedural duties, reached a clearly erroneous verdict.⁵³ Apparently, however, this has only happened thrice in modern times.⁵⁴ Article 149 of the 1994 Belgian Constitution, however, also requires that "all judgments shall contain reasons."⁵⁵

B. The Evidence Presented and the Questions Asked of the Jury

On October 17, 2003, Richard Taxquet and seven others were tried by jury for the murder of honorary minister A.C. and the attempted murder of his partner M. H-J on July 18, 1991. The defendants were charged, in vague terms, as having been perpetrators, aiders and abettors, or instigators of the crimes.⁵⁶

Only one of the defendants testified in his own defense.⁵⁷ The jury heard testimony by two police officers that an anonymous informant—who was not a witness to the crime, had never been interrogated by the investigating magistrate, and whose name had never been revealed—allegedly

52. *Id.* at § 29. In French, the last phrase is: "Avez-vous une intime conviction?" *Taxquet*, *supra* note 1, at § 28. For an English translation of a very similar French instruction to a jury, which now sits as a mixed court, see THAMAN, *COMPARATIVE CRIMINAL PROCEDURE*, *supra* note 14, at 199.

53. *Taxquet* (GC), *supra* note 2, at § 31 (citing C.I.CR. art. 352).

54. *Id.*

55. "Tout jugement est motivé. Il est prononcé en audience publique." 1994 CONST. art. 149 (Belg.), available at http://www.senate.be/doc/const_fr.html#c36.

56. *Taxquet* (GC), *supra* note 2, at § 10.

57. *Id.* at § 11.

declared that six people, including the defendant and another important political figure, had planned the assassination of the minister before the vacation period of 1991 because he had promised to make some important revelations upon his return.⁵⁸

Although the jurors were instructed that the anonymous informant was not one of the defendants, a public broadcast on the state radio-television network for the French-speaking part of Belgium aired a statement by one of Taxquet's co-defendants, S.N., who claimed that he was the anonymous informant and had received three million Belgian francs (74,368 Euros) for providing the information. This was confirmed by the Belgian minister of justice.⁵⁹ The trial court denied a motion by some of the defendants to have the anonymous witness questioned.⁶⁰

Thirty-two questions were submitted to the jury as part of the question list, all of which called, according to Belgian law, for a simple "yes" or a "no" answer. Four pertained to defendant Taxquet. The two relating to the murder of the minister are reproduced below (two additional questions phrased in the exact same way, relate to the attempted murder charge):

Question 25: Principal Count: Is the accused, Richard Taxquet, who is present in court, guilty, as principle or joint principle, either through having perpetrated the offence or having directly cooperated in its perpetration, or through having, by any act whatsoever, lent such assistance to its perpetration, that without it the offence could not have been committed, or through having by gifts, promises, threats, abuse of authority or power, scheming or contrivance, directly incited another to commit the offence, or through having, by means of speeches in a public place or assembly, or by means of any written or printed matter, image or emblem displayed, distributed or sold, offered for sale or exhibited in a place where it could be seen by the public, directly incited another to commit the offence, of having knowingly and intentionally killed A.C. in Liège on 18 July 1991?

Question 26: Aggravating Circumstance: Was the intentional homicide referred to in the previous question premeditated?⁶¹

The jury answered "yes" to all four questions.⁶² The defendant was sentenced to twenty years by the Assizes Court and appealed in cassation.⁶³

58. *Id.* at § 12. According to Articles 86bis and 86ter of the CCP-Belgium, a witness whose identity has been kept secret may not be called to testify, but the judge may read his testimony to the jurors during the trial. *Id.* at §§ 24, 33.

59. *Id.* at § 21.

60. *Id.* at § 13.

61. *Id.* at § 15.

62. *Id.* at § 16.

His appeal, alleging violations based on the prejudicial nature of the radio-television broadcast regarding the anonymous witness, the trial court's decision denying examination of the anonymous informant, and the jury's failure to give reasons for their answers to the questions in the special verdict, was rejected.⁶⁴

The Belgian Court of Cassation, following the initial 2009 decision of the ECtHR in *Taxquet*, found that Articles 342 and 348 CCP-Belgium, which accept non-reasoned jury verdicts, violated Article 6 of the ECHR and thus were no longer applicable. Under the particular facts of *Taxquet*, moreover, the defendant had a right to know whether his conviction had been based in whole or in part on the testimony of the anonymous witness.⁶⁵ The Belgian legislature responded with the Assize Court Reform of December 21, 2009, which instituted a requirement that the jury give reasons for its verdicts. The new Article 327 CCP-Belgium replaces the old instruction relating to *intime conviction*, which was displayed in the jury room, with the following: "The law provides that the accused may be convicted only if it is apparent from the evidence admitted that he is guilty beyond reasonable doubt of the offence with which he is charged." The new Section 334 CCP-Belgium, most importantly, requires the jury to "formulate the principle reasons for their decision."⁶⁶ Under the new procedure, the jury will first retire to deliberate on guilt, and after they have reached a verdict, they will then invite the three judge panel into the jury room to help them draft the reasons for the judgment.⁶⁷ Pursuant to Section 336(1) CCP-Belgium, if the three-judge bench

is unanimous in the conviction that the jurors have clearly erred in relation to the main reasons, especially in relation to the evidence, the content of legal concepts or the application of legal rules which led to the decision, the court declares in a reasoned order, that the case should be set aside and in the subsequent session be given to a new jury and a new court.⁶⁸

63. An appeal in cassation (German: "*Revision*") is an appeal based only on the record of the trial and on questions of law. There is no review of the adequacy of the factual findings of the court which is permissible in what Europeans call an "appeal" (German: "*Berufung*"). See CLAUS ROXIN, STRAFVERFAHRENSRECHT 391,403 (24th ed. 1995).

64. *Taxquet* (GC), *supra* note 2, at §§19, 20.

65. *Id.* at § 33.

66. *Id.* at § 36.

67. Moos, *supra* note 3, at 80–81 (citing C.I.CR. art. 344(1)).

68. *Id.* at 81.

C. *The Reasoning of the Grand Chamber of the ECtHR*

The Grand Chamber of the ECtHR issued its opinion in *Taxquet* on November 16, 2010, holding, in general, that “the Convention does not require jurors to give reasons for their decision and that Article 6 does not preclude a defendant from being tried by a lay jury even where reasons are not given for the verdict.”⁶⁹ However, the Grand Chamber qualified this assertion with the following language:

Nevertheless, for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness. . . . [T]he rule of law and the avoidance of arbitrary power are principles underlying the convention [citation omitted]. In the judicial sphere, those principles serve to foster public confidence in an objective and transparent justice system, one of the foundations of a democratic society [citations omitted].⁷⁰

As to the requirement of judicial reasons in non-jury cases, the Grand Chamber said:

In proceedings conducted before professional judges, the accused’s understanding of his conviction stems primarily from the reasons given in judicial decisions. In such cases, the national courts must indicate with sufficient clarity the grounds on which they base their decisions [citation omitted]. Reasoned decisions also serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part. In addition, they oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence. However, the extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case. While courts are not obliged to give a detailed answer to every question raised, [citation omitted] it must be clear from the decision that the essential issues of the case have been addressed [citation omitted].⁷¹

Finally, the Grand Chamber tried to articulate what factors in a case tried by a jury, which does not have to give reasons, could compensate for the absence of reasons, speaking in terms of “sufficient safeguards” to prevent arbitrary decision making:

Such procedural safeguards may include, for example, directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced . . . and precise, unequivocal questions

69. *Taxquet* (GC), *supra* note 2, at § 90.

70. *Id.*

71. *Id.* at § 91.

put to the jury by the judge, forming a framework on which the verdict is based or sufficiently offsetting the fact that no reasons are given for the jury's answers [citation omitted]. Lastly, regard must be had to any avenues of appeal open to the accused.⁷²

In applying this test to the facts of *Taxquet*, the Grand Chamber found that "neither the indictment nor the questions to the jury contained sufficient information as to the applicant's involvement in the commission of the offences of which he was accused."⁷³ As to the questions, the Court noted, that they "did not refer to any precise and specific circumstances that could have enabled the applicant to understand why he was found guilty."⁷⁴ In such a complicated two-month trial, the court noted, that

even in conjunction with the indictment, the questions put in the present case did not enable the applicant to ascertain which of the items of evidence and factual circumstances discussed at the trial had ultimately caused the jury to answer the four questions concerning him in the affirmative. Thus, the applicant was unable, for example, to make a clear distinction between the co-defendants as to their involvement in the commission of the offence; to ascertain the jury's perception of his precise role in relation to the other defendants; to understand why the offence had been classified as premeditated murder (*assassinat*) rather than murder (*meurtre*).⁷⁵

In conclusion, the Grand Chamber noted that no appeal of the factual basis for a judgment of a jury court is available in Belgium, because the appeal to the Court of Cassation is restricted to legal errors.⁷⁶

II. THE EXPERIENCE WITH REASONED JURY VERDICTS ON THE EUROPEAN CONTINENT

A. *The Swiss Experience*

The first jurisdiction to recognize that juries should and could give reasons for their judgments was Switzerland.⁷⁷ In 1952, the Swiss Federal Court threw out a judgment based on an unreasoned verdict of a Zurich jury, declaring:

72. *Id.* at § 92.

73. *Id.* at § 94.

74. *Id.* at § 96.

75. *Id.* at § 97.

76. *Id.* at § 99.

77. Section 331(3) of the Austrian Code of Criminal Procedure requires the foreperson of the jury to complete a "note" or *Niederschrift*, but these reasons or explanations are not considered part of the verdict, and are only used to aid the professional bench in the trial court and the appellate courts in assessing the verdict. Moos, *supra* note 3, at 75.

The Cantons are not prohibited from allowing a jury to adjudge the guilt question in its factual, or even in its legal aspect, and allowing a special jury court to pronounce on the legal consequences of the verdict. But like any other Cantonal penal determination, the final judgment must, whether through the jury's answering of sufficiently specific questions in its verdict, or in another form of giving reasons, show which facts were proved and which allegations of the prosecutor or responses of the defense should be treated as not proved or of insignificant importance.⁷⁸

The only Swiss Canton to attempt to save its jury system by requiring its jury to give reasons was the Canton of Geneva. On September 29, 1977, the Genevan parliament adopted a new code of criminal procedure which maintained a jury court for the trial of serious felonies and a mixed court for lesser crimes. At that time, the jury was required to give reasons only for its choice of the imposition of punishment,⁷⁹ but in 1992 the code was amended to permit the jury to give succinct reasons in cases where it felt its verdict might not be otherwise readily understood.⁸⁰ Further amendments to the code in 1996 required the jury to give systematic reasons for each of its responses in the question list and allowed the jury to summon the clerk (*greffier*) of the court into the jury room to aid them in articulating their reasons. On the basis of these reasons, the professional bench would then draft the reasons for the judgment.⁸¹

On January 1, 2011, a federal code of criminal procedure for Switzerland went into effect which replaced all of the Cantonal codes. The new federal code does not include any section for jury trial. Most commentators agree that this will result in the elimination of jury trial in Switzerland, even though the Cantons still have the competence to decide the composition of their courts.⁸² Section 327 of the Genevan Code of Criminal Procedure, while still in force, required the jury to state "the reasons for taking into account or disregarding the main items of evidence and the legal reasons for the jury's verdict and the decision by the court and the jury as to the sentence or the imposition of any measure."⁸³

78. Bundesgericht [BGer] June 27, 1952, 33 ENTSCHEIDUNG ENDES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] 78, 134, 143 (Switz.), available at <http://servat.unibe.ch/dfr/pdf/c4078134.pdf>.

79. Bernard Sträuli, *Le Jury Genevois*, 72 REV. INT'L DR. PÉNAL 317, 330–31 (2001).

80. *Id.* at 331–32.

81. *Id.* at 332. As we will see, *infra*, the last amendments to the Geneva code were perhaps influenced by the 1995 Spanish legislation which required the jury to give succinct reasons for its verdicts and allowed them to seek help from the judicially trained clerk of the court.

82. Moos, *supra* note 3, at 78.

83. Taxquet (GC), *supra* note 2, at § 58.

B. *The New Spanish Jury Court and the Requirement of Reasoned Verdicts*

1. Jury Court or Mixed Court?

Spain's democratic constitution, enacted in 1978 after the collapse of the Franco dictatorship, guaranteed in Article 125 the right of the people to participate in the administration of justice through trial by jury in a form determined by law.⁸⁴ However, Article 120(3) of the same constitution required reasoned judgments.⁸⁵ Spanish jurists and politicians debated for years on whether the term *jurado* (jury) could be interpreted to extend to the types of mixed courts into which the German, Italian and French juries had been converted.⁸⁶ In the end, however, the legislature enacted the Organic Law on the Jury Court of 1995 (hereinafter LOTJ-Spain),⁸⁷ which revived the classic jury.⁸⁸

2. The Organic Law on the Jury Court of 1995

The new Spanish jury court is composed of nine jurors sitting with one professional judge.⁸⁹ In conformity with the nineteenth century continental European model, the jury is provided with a list of questions which should be answered either "yes" or "no." This question list is called the *objeto del veredicto*, or verdict form, in Spain. The verdict form should set out the following propositions as to each charged crime and each charged defendant: (1) the facts which prove the commission of the crime (*corpus delicti*) and the defendant's identity as the perpetrator (*hecho principal*, or "principal fact"); (2) the defense allegations; (3) the facts which could completely justify or excuse the charged criminal acts; (4) a narrative of the facts that determine the degree of execution or participation in the offense, or any statutory aggravating or mitigating circumstances; and (5) the "crim-

84. Thaman, *Spain Returns*, *supra* note 15, at 242. "Los ciudadanos podrán participar . . . en la Administración de Justicia mediante la institución del Jurado, en la forma y con respecto a aquellos procesos que la ley determina . . ." CONSTITUCIÓN ESPAÑOLA art. 125 (Spain), available at <http://constitucion.rediris.es/legis/1978/ce1978-1.html>.

85. "Reasons shall always be given for judgments which shall be pronounced in public session." ("Las sentencias serán siempre motivadas y se pronunciarán en audiencia pública.") *Id.* at art. 120.

86. For a brief summary of the discussions between 1978 and 1995, see Thaman, *Spain Returns*, *supra* note 15, at 250–56.

87. LEY ORGÁNICA DEL TRIBUNAL DEL JURADO [L.O.T.J.], B.O.E. n. 122, May 22, 1995 (Spain), available at <http://dgraj.justicia.es/secretariosjudiciales/docs/jurado.pdf>.

88. Spain had never known a mixed court but had had jury systems on and off from the mid-nineteenth century through Franco's victory in the Spanish civil war in 1939. Thaman, *Spain Returns*, *supra* note 15, at 246–49.

89. L.O.T.J., B.O.E. n. 122, May 22, 1995 at art. 2.

inal act as to which the defendant must be declared guilty or not guilty.”⁹⁰ The law requires that decisions unfavorable to the defendant be decided by a super-majority of seven of nine votes, and that those favorable to the defendant, be decided by a simple majority of five votes.⁹¹

The most innovative aspect of the new Spanish jury law, however, is the requirement that the jury give reasons for its verdict. In its verdict, the jury must list in a first paragraph the propositions or questions it has found to be proved and indicate whether the vote was unanimous or by a majority. It should then list the propositions which it deemed had not been proved with the corresponding vote count. The jury then states its verdict of “guilty” or “not guilty.” The last paragraph, most importantly, begins with the words: “[t]he jurors have relied on the following pieces of evidence in making the preceding declarations,” followed by a list of the evidence. Thereafter the jurors must articulate a “succinct explanation of the reasons why they have declared, or refused to declare, certain facts as having been proved.”⁹² The jury may also summon the secretary of the court, who has a law degree, into the jury room to help them formulate their reasons.⁹³

The Spanish jury allows the judge to return the verdict to the jury if he notes any of the following problems:

(1)(a) if no pronouncement was made as to the totality of the factual propositions; (b) if no pronouncement was made as to the guilt or innocence of each of the defendants with respect to the totality of the charged criminal acts; (c) if the requisite majority was not obtained in any of the votes as to the various points; (d) if the diverse pronouncements are contradictory, either between those relating to the facts which have been declared as proved, or between the guilt pronouncements and the declaration as to the facts proved; (e) if some error has occurred in relation to the method of deliberation or voting.⁹⁴

90. *Id.* at art. 52. An earlier draft of the LOTJ-Spain would have had the jury decide whether or not the defendant was guilty of the “criminal offense” or *delito*, but the legislature finally settled for a finding of guilt of the “criminal act” (*hecho delictivo*). Thaman, *Spain Returns*, *supra* note 15, at 334–36.

91. L.O.T.J., B.O.E. n. 122, May 22, 1995 at art.59(1).

92. *Id.* at art. 61(1)(d). See also Thaman, *Spain Returns*, *supra* note 15, at 364.

93. L.O.T.J., B.O.E. n. 122, May 22, 1995 at art. 61(2). For a discussion of the role played by the secretary in drafting reasons in the first year of Spanish jury trials, see Thaman, *Spain Returns*, *supra* note 15, at 374–76.

94. L.O.T.J., B.O.E. n. 122, May 22, 1995 at art. 63(1). A report by the Prosecutor General of Spain lamented the fact that judges refused to return verdicts with clearly inadequate reasons feeding speculation that the reason was that some judges were “bent on destroying the institution.” RAQUEL LÓPEZ JIMÉNEZ, *LA PRUEBA EN EL JUICIO POR JURADOS* 383–84 (2002). See *infra*, for the dispute as to whether Article 63(1) of the LOTJ-Spain allows return of a verdict with deficient reasons.

Spanish law does, however, give the trial judge the ability to control, to some extent, the possibility of the conviction of the innocent. A provision modeled on Federal Rule of Criminal Procedure 29⁹⁵ provides:

Once the evidence of the prosecution has been heard, the defense can move the presiding judge, or he can decide *ex officio*, to dissolve the jury, if he holds that the trial did not result in the existence of inculpatory evidence which could be the basis of a condemnation of the accused.⁹⁶

This gate-keeping role of the judge, which was used only twice in the first two years of Spain's new jury system,⁹⁷ should be the primary protection against letting juries deliberate on cases based on shoddy evidence. Another provision requires the trial judge, before accepting a verdict of guilty, to "concretize the existence of inculpatory evidence necessitated by the constitutional guarantee of the presumption of innocence."⁹⁸ Once the judge accepts a verdict of guilt, he or she then must write a judgment which does not question the facts found to have been proved; the judgment must give the facts a legal qualification and then impose a sentence.⁹⁹

D. The Adequacy of the Reasons Given in the First Years of the Modern Spanish Jury Trial

In the first year or two of Spanish jury trials, the reasons given by the jury in their guilty verdicts were often skeletal and/or conclusory, revealing little information as to why and how the jury reached its conclusions. Typical explanations mentioned the "witnesses," or the "evidence, experts, defendant's testimony" without further detail.¹⁰⁰ In other cases, juries mentioned the witnesses upon whom they relied in deciding each question in the verdict form, and sometimes emphasized the special importance of one witness's testimony, or the contradictions or lack of credibility of the defendant's testimony.¹⁰¹ On occasion, the jury would clarify the deduc-

95. Encarnación Aguilera Morales, *Observaciones Críticas a las Causas de Disolución Anticipada del Jurado (I)*, LA LEY (Spain), Oct. 14, 1997, 1, at 2.

96. L.O.T.J., B.O.E. n. 122, May 22, 1995 at art. 49(1).

97. José Manuel De Paúl Velasco, *Presunción de Inocencia e in dubio pro reo en el Juicio ante el Tribunal del Jurado*, in LA LEY DEL JURADO: PROBLEMAS DE APLICACIÓN PRÁCTICA 473, 525 (Luis Aguiar de Luque & Luciano Varela Castro eds., 2004).

98. L.O.T.J., B.O.E. n. 122, May 22, 1995 at art. 70(2).

99. *Id.* at art. 70(1).

100. Thaman, *Spain Returns*, *supra* note 15, at 366. However, in many of the cases with inadequate reasons there was no dispute as to the facts so no appeal ensued. Eugenio-Vicente Ponz Nomdedeu, *Determinación del Objeto del Veredicto*, in COMENTARIOS A LA LEY DEL JURADO 795 (Juan Montero Aroca & Juan-Luis Gómez Colomer eds., 1999).

101. Thaman, *Spain Returns*, *supra* note 15, at 366-67.

tions it had made from circumstantial evidence to prove specific propositions on the verdict form.¹⁰²

Jurors, however, sometimes gave admirably detailed reasons for the answers on the question list. In one case in Barcelona, the General Counsel of Judicial Power (CGPJ) noted that “the reasons are extensive, concrete, individualized and expressive. Fact by fact they indicate the source of proof and the reason why they reached it.”¹⁰³ The CGPJ also mentions the Madrid Provincial Court decision of *Bernárdez & Others*, where the jury filled out three pages of “extensive, minute, individualized and expressive reasons” where they identified “not only the source of evidence but its evidentiary content.”¹⁰⁴

Many of the problems in the first couple of years of the Spanish jury trial system can be attributed to its novelty and the judges’ lack of experience in drafting the special verdicts and instructing the jury.¹⁰⁵ When the Supreme Court began to overturn jury verdicts due to the inadequacy of the juries’ reasons, however, the trial courts, at least in part, began to pay more attention to how they directed juries to deal with the task of providing its reasons for reaching a verdict.¹⁰⁶

One way to ensure that the jury gives cogent reasons for its answers is to instruct them to do so. Judge of the Seville Provincial Court, José Manuel De Paúl Velasco,¹⁰⁷ gives the following instruction to his juries:

102. *Id.* at 368. José Manuel De Paúl Velasco and Miguel Carmona Ruano, two judges of the Sevilla Provincial Court, were commissioned by the Consejo General del Poder Judicial (General Council of the Judicial Power) to write a study on the first years of the experience with the new jury system. They studied the reasons given in 139 verdicts returned from May 1996 through March 31, 1998 and found the reasons sufficient in seventy, and clearly insufficient or non-existent in fifty. CONSEJO GENERAL DEL PODER JUDICIAL, INFORME DEL CONSEJO GENERAL DEL PODER JUDICIAL SOBRE LA EXPERIENCIA DE LA APLICACIÓN DE LA VIGENTE LEY ORGÁNICA DEL TRIBUNAL DEL JURADO 74 (1998); see also Thaman, *Europe’s New Jury Systems*, *supra* note 16, at 345.

103. *Anexo. Informe Sobre la Aplicación de la Ley del Tribunal del Jurado Desde el 1 de Abril de 1997 al 31 de Marzo de 1998 (CGPJ)*, 13 ACTUALIDAD PENAL 615, 632 (2000) (referring to the case of *Mateo & Blásquez*, which ended in an acquittal of all charges) [hereinafter *CGPJ-Informe-Anexo*]. For a description of the facts of the case, see Thaman, *Spain Returns*, *supra* note 15, at 439–40.

104. *CGPJ-Informe-Anexo*, *supra* note 103, at 632. For another set of comprehensive reasons, see Jury Case 18/2002, Madrid Provincial Court, Case of Idelfonso Romero Contreras (Judge Juan José López Ortega), Appendix (on file with the author).

105. I also think some of the problems can be attributed to judges’ antipathy toward trial by jury and a lack of incentive to learn the new system. Most judges I have talked to think the jury should be either abolished or converted into an expanded mixed court.

106. I studied the question lists in virtually all of the 75–80 trials conducted from May 27, 1996, through June 1, 1997, the first full year of trials under the new jury law. Thaman, *Spain Returns*, *supra* note 15, at 246. I have compared these with some of the verdict forms used in Madrid Provincial Court from 2001 through 2010, when I have been taking my students to visit the jury courts. Judge Juan José López Ortega, the judge in one of the first three jury cases on May 27, 1996, has also collected a number of his verdicts for me to peruse.

107. See *supra* note 100.

[Article] 120(3) of the constitution requires that judgments have reasons, and you are in a certain way judges and also have to give reasons for your verdict. If you omit this necessary explanation of the jury's reasons for considering the facts proved or not proved, the verdict will have to be returned to you to revise the error. It is preferable to make the explanation fact by fact and, if possible, briefly, but it has to be concrete. It is not sufficient to just say that a fact was declared to be proved "by the witnesses," one must say, for example, "all the witnesses said that it happened in this way," or "the witness X said this, and we feel it is more convincing than witness Y, who said the contrary, as to this or that."¹⁰⁸

E. The Debate about the Nature of Jury Reasons in Spain

1. Introduction

The Spanish Code of Criminal Procedure (CCP-Spain), which was promulgated in 1882¹⁰⁹ with the classic jury in mind,¹¹⁰ allowed judges to "appreciate the evidence admitted at trial according to their conscience" when issuing their judgment.¹¹¹ The CCP-Spain does not require judges to give reasons for the facts they deem to have been proved, nor even to list all of the facts which lay at the base of the judgment.¹¹² Similarly, the German Code of Criminal Procedure (hereinafter CCP-Germany),¹¹³ adopted in 1877 at a time when juries still decided only the most serious felonies, exhorted the trial judge to rule based on his "free conviction derived from the content of the trial."¹¹⁴ When issuing a judgment of conviction, the CCP-Germany required the trial judge only to list the facts proved which reflected the elements of the charged crime, or the presence or ab-

108. José Manuel De Paúl Velasco, *Instrucciones al Jurado. Observaciones Prácticas con Alguna Incursión Teórica*, in PROBLEMAS DEL JUICIO ORAL CON JURADO 203, 227 (Consejo General del Poder Judicial ed., 1999). Judge De Paúl Velasco also insists that there is no cultural or structural impossibility for Spanish jurors to properly express their reasons for a verdict. Whether the jury's reasons are properly expressed depends on the conciseness and clarity of the verdict form and on the careful attention given to the instructions. *Id.* at 225. For an opinion that Article 54 of the LOTJ-Spain, which contains the provision relating to instructions, should include instructions to the jury on how to articulate reasons for direct evidence and circumstantial evidence cases, see Yolanda Doig Díaz, *La Motivación del Veredicto en el Tribunal del Jurado*, LA LEY (Spain), Nov. 17, 2003, at 1, 5 [hereinafter Doig Díaz 2003].

109. L.E. CRIM. (Spain), available at http://constitucion.rediris.es/legis/1882/11882-09-14/11882-09-14_indice.html.

110. LÓPEZ JIMÉNEZ, *supra* note 94, at 370.

111. L.E. CRIM. Art. 741.

112. Thus, ironically, the LOTJ-Spain requires more of juries than the CCP-Spain does from judges in justifying their decisions. LÓPEZ JIMÉNEZ, *supra* note 94, at 370-71.

113. Strafprozessordnung [StPO] [CODE CRIM. PRO.], Feb. 1, 1877, Reichsgesetzblatt [RGBl.] 253, available at <http://bundesrecht.juris.de/stpo/index.html> [hereinafter CCP-Germany].

114. *Id.* at § 261 ("Über das Ergebnis der Beweisaufnahme entscheidet das Gericht nach seiner freien, aus dem Inbegriff der Verhandlung geschöpften Überzeugung.").

sence of excuses, justifications or mitigating and aggravating circumstances that may have been pleaded.¹¹⁵

One can compare the language of the nineteenth century codes of criminal procedure in Germany and Spain, which still reflect the state of affairs when juries were a powerful force on the European continent, with the Italian Code of Criminal Procedure (hereinafter CCP-Italy), which was passed in 1988,¹¹⁶ long after the classic jury had been converted into a mixed court and under the aegis of a constitution requiring reasoned judgments.¹¹⁷ Thus Section 192(1) CCP-Italy prescribes that the judge should evaluate the evidence, taking account of “the results obtained and the criteria adopted.”¹¹⁸

Despite the old language that provided for decisions according to *in-time conviction* or “conscience,” however, the jurisprudence in Europe has developed to require that judgments in criminal cases be based on a rational evaluation of the evidence.¹¹⁹ Thus, in 1990 the Spanish Constitutional Court, in interpreting Article 120(3) of the Spanish Constitution, pronounced in favor of “a reasoned decision in terms of law and not a simple and arbitrary act of will of the judge in the exercise of judicial absolutism which must be rejected.”¹²⁰ Later, in a decision of 2001, the Constitutional Court further specified, that

every judgment of conviction: (a) must express the evidence upon which one bases a declaration of penal responsibility; (b) this basis must consist of real evidence which conforms to the law and the constitution; (c) introduced normally during the trial, except for the admissible constitutional exceptions; (d) evaluated, and sufficiently motivated by the courts, submitting to the rules of logic and experience.¹²¹

With an emphasis on “the rules of logic and experience,” the Spanish high courts have adopted the German approach to “free evaluation of the

115. *Id.* at § 267(1) (“Wird der Angeklagte verurteilt, so müssen die Urteilsgründe die für erwiesen erachteten Tatsachen angeben, in denen die gesetzlichen Merkmale der Straftat gefunden werden. Soweit der Beweis aus anderen Tatsachen gefolgert wird, sollen auch diese Tatsachen angegeben werden.”).

116. D.P.R. n. 447/1988 (It.), available at <http://www.altalex.com/index.php?idnot=2011> [hereinafter CCP-Italy].

117. See note 36, *supra*.

118. Marcello Daniele, *La Valutazione Della Prova*, in *PROVA PENALE E UNIONE EUROPEA* 46 (Giulio Illumaniti ed., 2008).

119. *Id.*

120. VÉLEZ RODRÍGUEZ, *supra* note 28, at 147 (citing S.T.C., Feb. 15, 1990 (24/1990) (Spain)).

121. VÉLEZ RODRÍGUEZ, *supra* note 28, at 141 (citing S.T.C., July 4, 2001(124/2001) (Spain)). According to an opinion of the Supreme Court of Spain, a judgment must comport with the “rules of logic and the maxims of experience and scientific knowledge” or it may be reversed in cassation. *Id.* at 150 (citing S.T.S., Feb. 7, 1994 (979/1994) (Spain)).

evidence” as first articulated by Savigny in 1846.¹²² This statutory freedom from explaining, subjectively, *why* a judge found the facts underlying the conviction to have been proved—originally given the Germany judge by the CCP-Germany—was also limited by the German high courts who took it upon themselves to review whether the finding of the facts and the subsumption of these facts to the charged offense “are possible in the terms of the laws of thought and whether they jibe with the experiences of everyday life and the results of science.”¹²³ Italian judges must also give reasons according to the “criteria of reasonableness with respect to three types of rules: of logic, science and common experience.”¹²⁴

The Spanish Supreme Court has vacillated between at least two approaches in assessing the adequacy of the jury’s reasons: a “flexible” approach and a “demanding” (*exigente*) approach. The flexible approach requires little more than the jury stating the evidence presented at trial upon which it based its verdict, whereas the demanding approach requires the jury to actually say why and how it arrived at its determination of the facts, thus resembling the explanation demanded of professional judges in drafting a judgment.¹²⁵ The intermediate appellate court of the Basque Country, which hears appeals of jury decisions, has recognized three approaches to the adequacy of jury reasons: the maximal, the minimal and the intermediate. The maximalist approach requires a detailed and minutely critical description of the reasoning the jury used to find whether a proposition was proven or not. The minimalist approach requires only a skeletal affirmation of which propositions were found proved, and an intermediate approach—which the intermediate appellate court of the Basque Country follows, requires the jury to articulate the means of proof upon which it relied.¹²⁶

Proponents of the flexible, or minimalist, approach tend to consider that the “succinct” reasons given by a jury are not constitutionally required because a jury’s verdict is not the same as the judgment of the court, and that the reasoning or logic behind a verdict can be interpreted by the trial and appellate judges based on the jury’s answers to the propositions in the

122. See *supra* note 28.

123. DEPPENKEMPER, *supra* note 11, at 267 (citing ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES STRAFSACHEN 12, 311, 315 [hereinafter BGHSt]).

124. PAOLO TONINI, MANUALE DI PROCEDURA PENALE 619 (6th ed. 2005).

125. Yolanda Doig Díaz, *Sobre la Motivación del Veredicto del Tribunal del Jurado*, LA LEY, No. 16 (2005), 2, at 6 [hereinafter Doig Díaz 2005]. Whether the Supreme Court adopts the “demanding” or the “flexible” approach depends on the judges on the particular panel which decides the case. De Paül Velasco, *Presunción de Inocencia*, *supra* note 97, at 541–42.

126. LÓPEZ JIMÉNEZ, *supra* note 94, at 369–70 (citing T.S.J. del País Vasco, June 26, 1997).

question list and in light of the quality of the evidence adduced at trial.¹²⁷ This approach is closer to the traditional approach of continental European jury systems where a properly articulated special verdict, if answered in non-contradictory fashion by the jury, would, in conjunction with the evidence adduced at trial, provide sufficient proof of the logical nature of the jury's decision. While the conclusory nature of the question list in the *Taxquet* case would have been insufficient to reveal the factual basis of the jury's decision, my reading of *Taxquet* is that the ECtHR would accept a flexible approach to a jury's reasoning, and even a general common law verdict in cases where the evidence was clear and the judicial instructions provided appropriate guidance.

I will now provide a brief look into how the more flexible and more demanding approaches have been applied in Spanish case law and how they have been received in the literature. Since the flexible approach places a greater burden on the judge to guide the jury and, if necessary, complement its efforts, I will first discuss: (1) the controls which exist in Spanish law to make sure there is sufficient evidence upon which to base a conviction, (2) the role of the question list or verdict form in establishing the jury's findings of facts based on the evidence heard at trial, and (3) the ability of the judge to return a verdict to the jury to supplement clearly inadequate reasons. I will then compare the flexible and more demanding approaches as they relate to jury reasons in three types of cases: (1) verdicts of guilty based on direct evidence, (2) verdicts of guilty based on circumstantial evidence, and (3) acquittals.

To put the above topics in a proper context, however, I will first present a brief summary of perhaps the two most sensational cases tried in the jury courts since they commenced in May of 1996: the case of *Mikel Otegi* and the so-called *Wanninkhof* case. Both of these cases set groundbreaking precedent in the area of jury explanations, yet also, due to the controversial nature of the verdicts, threatened the very existence of the new jury system.¹²⁸

127. See, e.g., Juan Montero Aroca, *Recursos Contra Sentencias*, in LA LEY DEL JURADO: PROBLEMAS DE APLICACIÓN PRÁCTICA, *supra* note 97, at 737, 764; Andrés de la Oliva Santos, *Algunos Aspectos de la Presunción de Inocencia y los Juicios con Jurado*, in LA LEY DEL JURADO: PROBLEMAS DE APLICACIÓN PRÁCTICA, *supra* note 97, at 449, 469.

128. Julio M. Lazarus, *Al Jurado se la Tienen Jurada*, EL PAÍS (Spain), Oct. 6, 2003, available at http://www.elpais.com/articulo/espana/jurado/tienen/jurada/elpepiesp/20031006elpepinac_11/Tes?print=1 (discussing calls to convert Spain's jury system into a mixed court with lay assessors due to the result in the *Otegi* and *Wanninkhof* cases). See also Thaman, *Spain Returns*, *supra* note 15, at 405–12, for a discussion of the attempts to convert the jury system into a mixed court after the *Otegi* verdict.

2. The Case of *Mikel Otegi*

On December 10, 1995, Mikel Otegi, a young Basque truck driver with sympathies for the Basque independence movement, shot and killed two Basque police officers at his farm in Guipúzcoa Province after they had followed him home on the suspicion he was driving while intoxicated. Otegi called the police and said he had killed the officers and waited for them to come and arrest him. He had a 0.15 blood alcohol content when tested after his arrest. On March 16, 1997, a jury by a majority verdict acquitted him of murder based on a finding that a combination of his alcoholic intoxication and emotional disturbance—caused by his feeling constantly harassed by the Basque police—had caused him to be in a state of temporary insanity. The jury was asked ninety-eight questions addressing the allegations of the prosecution and the defense, and the jury answered all the questions in accordance with the defense's theory of temporary insanity. As to the questions relating to guilt, which it answered "not proved," the jury merely indicated in its reasoning that the questions were "deficiently proved," and, finally, that it "had doubts."¹²⁹

The verdict form was answered as follows (after edits made by the author):

A. Principal Facts of the Prosecution

1. UNFAVORABLE FACT: Mr. Mikel Mirena Otegi Unanue [hereinafter "Otegi"], on December 10, 1995, around 10:30 a.m., at the farmhouse Oteizabal, voluntarily and with intent to kill, shot Mr. Ignacio Jesús Mendiluce Echeberria [hereinafter "Mendiluce"] with a .12 caliber shotgun, hitting him in the lower right clavicular region and killing him instantly. **Not Proved. Majority**

2. UNFAVORABLE FACT: Otegi, on the same day and at the same time in the same place, and voluntarily, with intent to kill, shot José Luis González Villanueva [hereinafter "González"] hitting him in the left scapular region and killing him instantly. **Not Proved. Majority**

3. UNFAVORABLE FACT: Otegi shot Mendiluce without there having been any provocation on the part of the latter. **Not Proved. Majority**

4. [same as "3" in relation to González]

5. UNFAVORABLE FACT: Otegi shot Mendiluce from a distance of approximately 1.5 meters. **Proved. Unanimously**

129. For a narrative of the facts of the *Otegi* case, a list of newspaper articles dealing with the case, and copies of the accusatory pleadings in the case, see Thaman, *Spain Returns*, *supra* note 15, at 497–503, 517–24.

6. UNFAVORABLE FACT: Otegi shot González from a distance of approximately 2.5 meters. **Proved. Unanimously**

7. UNFAVORABLE FACT: Otegi shot Mendiluce in a sudden and unexpected fashion. **Not Proved. Majority**

8. UNFAVORABLE FACT: Otegi shot Mendiluce before he had a chance of defending himself. **Not Proved. Majority**

9. UNFAVORABLE FACT: Otegi shot González in the back. **Not Proved. Majority**

10. [same as “7” in relation to González]

11. [same as “8” in relation to González]

12. UNFAVORABLE FACT: At the moment of receiving the mortal wound, Mendiluce was a Basque Police officer, dressed in his official uniform and exercising his lawful duties. **Proved. Unanimously**

13. [same as “14” in relation to González]

14. UNFAVORABLE FACT: Otegi was conscious that he was shooting at a Basque police officer when he fired at Mendiluce. **Not Proved. Majority**

15. [same as “14” in relation to González]

[Questions 16–19 relate to issues only relevant to a civil action for damages.]

B. Principal Facts of the Defense

[Questions 20–48, all favorable to the defense, dealt with Otegi’s drinking during the day prior to the shootings, his aggressive conduct with an off-duty police officer in a bar, his being followed home by the two victims due to erratic driving, his being awakened by the victims, his getting his shotgun after an argument had started and one officer had pulled his duty revolver. All were found to be proved by the jury.]

48. FAVORABLE FACT: At this location the argument with the Basque Police officers resumed, Otegi now armed with the loaded shotgun. **Proved. Unanimously**

49. FAVORABLE FACT: In the course of the argument, the Basque Police officer González pointed his weapon at Otegi. **Proved. Majority**

50. FAVORABLE FACT: In the course of the argument, Otegi felt that the weapon of the Basque Police officer González was pointed at him. **Proved. Majority**

51. FAVORABLE FACT: Then Otegi completely lost control of his actions. **Proved. Majority**

52. FAVORABLE FACT: (only if the preceding fact “51” has not been proved): Then Otegi partially lost control of his actions. (No answer)

53. UNFAVORABLE FACT: In this situation, Otegi fired the shotgun. **Proved. Unanimously**

54. FAVORABLE FACT: Otegi fired two shots without intending to kill. **Proved. Majority**

55. FAVORABLE FACT: Otegi fired two shots without consciousness of killing. **Proved. Majority**

[Questions 56–68 refer to mitigating circumstances which happened after the killings, such as calling the police, not escaping, remorse, etc.]

C. Facts Alleged by the Parties Which Can Go Towards Proving a Lack of Criminal Responsibility

69. FAVORABLE FACT: Otegi has a personality with a propensity or predisposition to experience feelings of harassment and persecution on the part of the Basque Police. **Proved. Majority**

70. FAVORABLE FACT: In Otegi there exists a pre-existing pathological condition or an ailment or an underlying psychic disturbance in connection with the aforementioned sense of harassment and persecution by the Basque Police which he experienced in extreme ways, intolerable for his personality. **Proved. Majority**

[Questions 71–75, all of which were proved, deal with prior incidents Otegi had with the Basque Police and the fact that they patrolled his house.]

76. FAVORABLE FACT: Otegi consumed an excessive quantity of alcoholic beverages between the afternoon and evening of December 9 and 10, 1995, until he achieved a state of inebriation. **Proved. Unanimously**

77. FAVORABLE FACT: The conjunction of all of the facts laid out in numbers “69” through “76” of Part C, or, in the alternative, of those which have been declared proved, had as a result that in the moment of firing the weapon Otegi was absolutely not in control of his actions. **Proved. Majority**

D. Facts Which Determine the Modification of Criminal Responsibility

[Questions 78–91 deal with various favorable and unfavorable facts which could aggravate or mitigate criminal liability.]

E. Criminal Acts for Which the Defendant Must Be Declared Guilty or Not Guilty

92. Otegi intentionally killed the Basque Police officer González, who wore the official uniform and was on active duty, shooting in a sudden and unexpected manner from a shotgun which he held without giving him a chance to defend himself. **Not Guilty. Majority**

93. (Only in case the defendant is declared not guilty of the fact contained in the preceding number 92): Otegi intentionally killed the Basque Police officer González, who wore the official uniform and was on active duty, shooting him with the shotgun he held and using the advantage said shotgun gave him. **Not Guilty. Majority**

94. [same as “92” in relation to Mendiluce]

95. [same as “93” in relation to Mendiluce]

[Questions 96–98 relate to issues of clemency or suspension of sentence in case of conviction.]

Reasoning

Referring to the questions “92,” “93,” “94,” and “95,” the jury finds that they were “deficiently proved,” and finds the circumstances “not proved” or “had doubts.”¹³⁰

The *Otegi* case shocked the Spanish public and led to calls for the abolition of trial by jury or its conversion into a mixed court.¹³¹ The acquittal was reversed by the Superior Judicial Court of the Basque Country and the reversal was upheld by the Supreme Court.¹³² The defendant appealed to the Constitutional Court, claiming that requiring the jury to provide reasons for an acquittal violated the presumption of innocence. The Constitutional Court upheld the reversal, holding that verdicts to acquit must also contain sufficient reasons for the decision. The opinion and a dissent by the President of the Constitutional Court will be discussed below.

3. The *Wanninkhof* Case (The Trial of Dolores Vázquez)

On October 9, 1999, fifteen year-old Rocío Wanninkhof disappeared after attending a fair in Málaga province. She was apparently murdered the next morning, and her nude body was found on November 2, 1999, between Marbella and San Pedro de Alcántara, in Málaga Province. The girl’s mother, Alicia Hornos, suspected her former lesbian lover, Dolores Vázquez, a travel agent with whom she had lived for many years, because Vázquez had had a contentious relationship with Rocío as she was growing up. The police wire-tapped Vázquez’s phones and even sent a female psychologist undercover to befriend Vázquez. However, no concrete evidence

130. THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 14, at 195–98.

131. On the *Otegi* case and its aftermath, see Thaman, *Spain Returns*, *supra* note 15, at 405–12, 497–503, 517–24.

132. For a discussion of the decision of the Superior Court of Justice of the Basque Region, see *id.* at 372–73; for an English translation of the gravamen of the decision of the Supreme Court, see THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 14, at 199–201.

was discovered. The psychologist was only able to testify that Vásquez was “calculating, cold, and aggressive.” The investigating magistrate ordered searches of Vásquez’s home and office, which also turned up nothing. The police claimed they found two fibers at the scene of the crime which matched Vásquez’s clothing. She was eventually arrested, interrogated on numerous occasions, and persisted in denying responsibility for the murder. A laboratory analysis determined that the fibers were not from Vásquez’ clothes, but she was not released. All the while the media followed the sensational story, concentrating on the lesbian relationship between Hornos and Vásquez and calling Vásquez the “cold, calculating murderess.”

Vásquez was charged with the murder of Rocío Wanninkhof and no direct evidence was presented of her guilt. The prosecutor, over defense objections, repeatedly emphasized the lesbian relationship between Vásquez and the victim’s mother. A fortune teller, called a “witch” in the media, testified that Vásquez came to her and talked of “plans of revenge.” Two Ukrainians, who were illegally in Spain and worked for Vásquez as maids, testified that they saw Vásquez take a knife and stab a picture of Rocío which had appeared in a local newspaper. A member of the Spanish Civil Guard testified that Vásquez’s fingerprints were on a bag left at the scene where the body was found, but the judge refused to let a defense expert test the fingerprints. Defense counsel tried to make a motion for a directed verdict of acquittal based on the lack of evidence, and moved to dissolve the jury per Article 49 LOTJ-Spain based on the lack of inculpatory evidence, but the trial judge did not respond. Defense counsel then thought if he drew the jury’s attention to the motion and it was denied, the jury would think that the judge felt there was sufficient evidence to convict, so he did not persist with the motion.¹³³

The relevant propositions in the question list in the *Wanninkhof* case, along with the jury’s answers, are reproduced below:

1. The defendant, Dolores Vásquez Mosquera, an adult, without a criminal record, met Alicia Hornos Lopez in 1981 who was in the process of divorce from her husband Guillermo Wanninkhof, with whom she had three children, Rosa Blanca, Rocío and Guillermo. In 1982 an intimate relationship led to them living together along with Alicia’s children, which remained more or less stable for 10 years, in the dwelling which both purchased, until 1995 in which the relationship ceased and Alicia departed with her children to a different dwelling close to that of defendant. **Proved. Unanimously.**

133. Katharina Rueprecht, *Der Fall Wanninkhof*, in KATHARINA RUEPRECHT & ASTRID WAGNER, GESCHWORENENPROZESSE 75 (2008). For an example of such a motion, see L.O.T.J., B.O.E. n. 122, May 22, 1995 at art. 49.

2. When the girl Rocío Wanninkhof reached the age of adolescence she developed an aversion to Dolores Vázquez because of the punishment she received from her and the rejection she felt as to the relation her mother maintained with defendant, as well as the fact that she owed her mother a quantity of money. The defendant also finally began feeling the aversion and hatred towards Rocío. **Proved. 7–2**

3. The defendant Dolores Vázquez, moved by the hatred she felt towards Rocío Wanninkhof, which she claimed caused the intimate break with Alicia, Rocío's mother, and having left in the night of October 2, 1999 in the neighborhood of her house armed with a knife, met Rocío Wanninkhof between 9:40 and 10:00 p.m., who was walking in the road which left la Barriada de la Cala de Mijas towards the hippodrome in that locality, between the urban project El Limonar and the urban project los Claveles Costa, heading for her house No. 97 in the urban project la Cortijera de Mijas Costa. An argument arose between the two which caused defendant to heat up in an extreme manner and stab Rocío which produced a hemorrhage causing her to use a paper handkerchief to clean the blood. Defendant, taking advantage of the surprise and defenselessness of Rocío, stabbed the young girl in the chest, who realizing she was gravely hurt, tried to escape towards an esplanade near her house, leaving a large trail of blood on this path, and falling exhausted on the ground, where the defendant stabbed her 8 times in the back, causing her death. Once she realized she was dead, she used an unidentified car to remove the body, taking it to her home where she kept it a few days. Once she decided what to do, she took the body, either alone or with undetermined persons, to the tennis Club "Altos del Rodeo" at the municipal terminal of Marbella, near San Pedro de Alcántara, some 150 meters from highway N-340 where she deposited it between the weeds with her legs open. Some days before the body was found, the defendant or someone else at her request, brought some plastic bags which contained the clothing of Rocío to this place, in order to facilitate the finding of the body. **Proved. 7–2**

4. The defendant performed the above-described attack, consisting of a knife wound in the chest, which was triggered by the fact that Rocío demanded money that Dolores owed her mother, by taking advantage of the circumstance that the attack upon the victim was completely unexpected and that the victim was therefore in a situation of defenselessness. **Proved. 7–2**¹³⁴

134. Rueprecht, *supra* note 133, at 76–79. I translated the verdict from German into English. Cf. references to the verdict form in the Supreme Court's decision in the *Wanninkhof* case at S.T.S., Mar. 12, 2003 (279/2003). All Spanish Supreme Court opinions available at <http://sentencias.juridicas.com/index.php>.

The jury convicted Dolores Vázquez of murder by a vote of seven to two.¹³⁵ The reasons they gave for their verdict were the following:

Documental evidence on pages 1919 to 1922, testimony of Dr. A.P. documented on 3 pages (653–655) of the file, witness testimony of Guardia Civil No. 76,974, in 19 pages (690–708) of the record of the trial, the expert testimony of the Psychologist of the Penitentiary Center, documented in 5 pages (764–769) of the trial record and in 6 pages of his report prepared and attached to the file, witness testimony of Ms. E.L. composed of 3 pages (682–684) of the trial file and 4 pages of the police report attached thereto, witness testimony of D.A.A. contained in 2 pages of the trial record and 1 page of the police report attached thereto, the confession of the defendant, contained in 29 pages (386–413, 467–469) of the trial file and 11 pages of the police reports and 15 pages of the investigative phase attached to the file, the witness testimony of Ms. H.A.H. documented in 17 pages (469–482 and 489–492) of the trial record and in 5 pages of the record of the preliminary hearing attached thereto.¹³⁶

Vázquez was sentenced to fifteen years imprisonment.¹³⁷ The case had made front page news in Spain throughout the entirety of the trial.

However, when the case was appealed to the Superior Justice Court of the Community of Andalucía, the judgment was overturned due to the insufficiency of the reasons. The prosecution appealed to the Supreme Court of Spain and the decision of the Andalusian court was upheld in an opinion by Perfecto Andrés Ibáñez, which constitutes the quintessential articulation of the “demanding” approach to jury reasons and will be discussed *infra*.

But with the reversal of the conviction of Dolores Vázquez, the case took a sudden, if not surprising turn. Five months after the Supreme Court affirmed the reversal, on August 14, 2003, seventeen year-old Sonia Carabantes was raped and killed after she attended a fair in Málaga Province. On Sept. 20, 2003, a British citizen, Tony King, who had been arrested in the Carabantes case, admitted to killing both Carabantes and Rocío Wankhof and DNA evidence confirmed the veracity of his confession.¹³⁸ King had a criminal record in England for assaulting women and was known as the “Holloway Strangler.”¹³⁹ Only on February 5, 2005, was the

135. Rueprecht, *supra* note 133, at 78–79.

136. Doig Díaz 2003, *supra* note 108, at 2.

137. S.T.S., Mar. 12, 2003 (279/2003).

138. Ignacio Martínez, *King Declara que Mató a Rocío y Sonia en Solitario*, EL PAÍS (Spain), Sept. 21, 2003, at 1, 19.

139. Walter Oppenheimer, *Interpol Revela que King Fue Condenado en su Adolescencia por Dos Intentos de Violación*, EL PAÍS (Spain), Sept. 23, 2003, available at http://www.elpais.com/articulo/espana/Interpol/revela/King/fue/condenado/adolescencia/intentos/violacion/elpporesp/20030923elpepinac_5/Tes.

case finally dismissed against Dolores Vázquez. King was convicted by jury on November 14, 2005, for the murder of Sonia Carabantes, and another jury convicted him on Dec. 2, 2006, unanimously for the murder of Rocío Wanninkhof, but seven of the nine jury members felt others were involved.¹⁴⁰

4. Judicial Controls on the Sufficiency of the Evidence for a Judgment of Guilt

Clearly, the first prerequisite for a reasoned or justifiable judgment of guilt must be that the prosecution was able to produce sufficient evidence, direct or circumstantial, which if believed, could constitute proof of the charge(s) beyond a reasonable doubt. Pursuant to Article 49 LOTJ-Spain, which was patterned after Federal Rule of Criminal Procedure 29(1),¹⁴¹ the trial judge should dissolve the jury and acquit the defendant “if he holds that the trial did not result in the existence of inculpatory evidence which could be the basis of a condemnation of the accused.”¹⁴² Even if the judge does not rule on a motion per Article 49 LOTJ-Spain before the jury retires, if the jury convicts, the judge must, as part of the judgment, “concretize the existence of inculpatory evidence necessitated by the constitutional guaranty of the presumption of innocence.”¹⁴³ The decision of the judge to deny a motion for a directed verdict of acquittal per Article 49 LOTJ-Spain, or the judge’s affirmation that sufficient evidence existed to rebut the presumption of innocence may both serve as a basis of appeal before the intermediate appellate court for jury cases, the Superior Court of Justice of the Community in which the trial was held.¹⁴⁴ Appeals in cassation to the Supreme Court of Spain are based on a “violation of the law or procedure.”¹⁴⁵

In Spanish doctrine, a precise distinction is made between the presumption of innocence, which is treated as an objective question of evidentiary sufficiency, and proof beyond a reasonable doubt or the principle of *in dubio pro reo* (all doubts in favor of the defendant), which is deemed to be a subjective decision by the trier of fact and not subject to review by the

140. Alicia Hornos, the mother of Rocío, apparently still believes Vázquez was involved in the killing. Rueprecht, *supra* note 133, at 89–90.

141. Thaman, *Spain Returns*, *supra* note 15, at 316.

142. Federal Rule of Criminal Procedure 29(a) speaks in terms of cases where the “evidence is insufficient to sustain a conviction.”

143. L.O.T.J., B.O.E. n. 122, May 22, 1995 at art. 70(2).

144. L.E. CRIM. § 846bis(c)(c, d).

145. *Id.* at § 847 (“[P]or infracción de ley y por quebrantamiento de forma”).

higher courts.¹⁴⁶ On the contrary, the objective decision as to the rebuttal of the presumption of innocence is subject to review in cassation (in a normal case), or even to the “appeal” allowed in jury cases, which, despite the rubric, does not include a re-evaluation of the facts or trial *de novo*.¹⁴⁷ Technically, the higher courts may review the objective decision of the trial court on the sufficiency of the evidence to undermine the presumption of innocence, but not the factual findings of the trial court, whether it is a purely professional court or a jury court.

Thus, the professional trier of fact’s evaluation of the evidence “according to conscience” prior to 1978 could not be challenged in cassation. The situation has changed, however, because Article 120(3) of the 1978 constitution requires judges to give reasons for all judgments, and the Spanish high courts have gradually allowed review of the sufficiency of the evidence found to be true by the trier of fact. The Spanish high courts have done so under the guise of a review of the adequacy of the judgment reasons now required by the constitution. Thus, under the guise of evaluating the adequacy of the trial court’s reasons, the Spanish Supreme Court began evaluating whether there was sufficient incriminating evidence, whether it was legally gathered and introduced, and finally whether it has been rationally evaluated, thus co-opting the role usually performed by European courts of “appeal.”¹⁴⁸ The evaluation of the evidence is two-tiered:

(1) a first level dependent on the immediate form of sensorial perception, conditioned by immediacy and which is beyond the control of a higher court which has not contemplated the taking of evidence and; (2) a second level of rational elaboration or subsequent argument which rejects the earlier determined evidence applying rules of logic, principles of experience or scientific knowledge and which can be reviewed in cassation: “censuring those foundations which end up illogical, irrational, absurd or, finally, arbitrary.”¹⁴⁹

The problem with the higher courts’ interpretation of Articles 49(1) and 70(2) LOTJ-Spain, however, is that the amount of evidence required by the judge to allow a case to go to verdict is only “minimal evidentiary ac-

146. De Paül Velasco, *Presunción de Inocencia*, *supra* note 97, at 522. On the notion that the judge makes an objective “appreciation” of the facts in relation to the presumption of innocence, but may not “evaluate” the evidence, an act which must be undertaken by the jury, see LÓPEZ JIMÉNEZ, *supra* note 94, at 263–67, 299. Cf. Montero Aroca, *supra* note 127, at 774.

147. On the difference between “appeal” and “cassation” in Europe, see *supra* note 63. The right to “appeal” guaranteed by Section 2(1) of Protocol 7 of the ECHR, which Spain has ratified, is often considered to allow a second level review of the factual determinations of the court of first instance. Aroca, *supra* note 127, at 745.

148. Miguel Carmona Ruano, *Recursos Contra Sentencias. Revisión del Hecho Probado*, in LA LEY DEL JURADO: PROBLEMAS DE APLICACIÓN PRÁCTICA, *supra* note 97, at 834–37.

149. *Id.* at 838.

tivity” of an incriminating nature adduced by the prosecution, with the judge accepting the interpretation of the evidence most favorable to the prosecution. It is then the jury’s duty to evaluate this evidence.¹⁵⁰ Thus, if the “minimal evidentiary activity” approach is taken, a case could go to the jury though the court is convinced that no reasonable person could find guilt beyond a reasonable doubt based on these facts.¹⁵¹ Some critics and court decisions have accepted that the judge may assess the objective weight of the evidence,¹⁵² yet others reject this notion, deeming it invades the province of the jury.¹⁵³

The upshot of this doctrine is that the high courts, including the Constitutional Court, scarcely ever link the notion of proof beyond a reasonable doubt with the presumption of innocence and will defer completely to the trial judge’s finding of “minimal evidentiary activity” supporting the charges. Thus, ironically, someone convicted of a misdemeanor, who has a right to “appeal” and get a trial *de novo* on the facts is better protected than someone facing felony charges or charges in the jury court.¹⁵⁴

In the *Wanninkhof* case the trial judge should have and could have dismissed the jury *sua sponte* and entered a directed verdict of acquittal per Article 49 LOTJ-Spain.¹⁵⁵ The tendency for conviction in high profile cases involving the murder of children often pulls police, prosecutors, and judges toward dismissing their own doubts about the case and letting the people decide. In this sense, the *Wanninkhof* case is typical of the many cases involving completely innocent persons who have been convicted and sentenced to death or long prison terms in the United States based on woefully insufficient evidence.

150. Aguilera Morales, *supra* note 95, at 2.

151. The United States Supreme Court has generally agreed with the fact that, for a guilty judgment to stand, the evidence must have been sufficient to convince a reasonable person of guilt beyond a reasonable doubt, and rejected an earlier standard, similar to the Spanish “minimal evidentiary activity” standard, which would only overturn a judgment based on insufficiency of evidence if there were “no evidence” of guilt. See *Jackson v. Virginia*, 443 U.S. 307, 318–20 (1979). Cf. LAFAVE ET AL., *supra* note 17, at 1167–68.

152. De Paül Velasco, *Presunción de Inocencia*, *supra* note 97, at 523.

153. For a discussion about the different interpretations of the judge’s role in this respect, see LÓPEZ JIMÉNEZ, *supra* note 94, at 268–72.

154. For a criticism of the separation of the two notions, and a position that the “presumption of innocence” is actually the constitutionalization of *in dubio pro reo*, see De Paül Velasco, *Presunción de Inocencia*, *supra* note 97, at 477–80.

155. José Antonio Hernández, *Los 20 Indicios Que Llevaron a la Cárcel a Dolores Vázquez*, EL PAÍS (Spain), Sept. 29, 2003, at 27 (The twenty pieces of evidence which led Vázquez to prison are “deductions without scientific basis” according to the report of the Guardia Civil).

5. Role of the Question List (Verdict Form) in Justifying the Verdict

If there is sufficient incriminatory evidence, which if believed could prove guilt beyond a reasonable doubt, then the trial should proceed for the purpose of allowing the jury to assess the credibility of the evidence and to determine whether the facts they deem proved constitute the elements of the charged crime(s). A properly constructed question list will shed considerable light on how the jury decided the case because it reveals, at least, which facts have been proved to its satisfaction. For the proponents of the most flexible version of jury reasons in Spain, and indubitably, those who adhere to a “minimalist” approach, this should be sufficient justification for a guilty judgment.¹⁵⁶ Even the most astutely drafted question list will not necessarily reveal *why* the jurors found the particular facts proved.¹⁵⁷

A verdict of guilt in a murder case in the United States, for instance, might just indicate that: “the jury . . . finds the defendant guilty of murder of the first degree.” All one really knows, then, is that the jury felt the prosecutor had proved the elements of first degree murder in relation as charged in the indictment. It is not even necessary, in some states, for the jury to indicate whether a finding of murder in the first degree was based on a finding of “premeditation and deliberation,” or whether the jury felt the prosecution had only proved the defendant took part in a robbery which resulted in the unintended death of the victim—so-called felony murder.¹⁵⁸

The task of the trial judge should be to formulate questions in factual terms, which, if found proved by the jury, would clearly constitute a particular criminal offense, including all of the necessary elements. The authors of the LOTJ-Spain were clear about the problem in their “exposition of reasons” which served as a prologue to the statute:

Alonzo Martinez [the drafter of the 1888 CCP-Spain] understood that to extend the competence [of the jury] to the *nomen iuris* of the crime was a manifestation of the confusion between fact and law and, in addition, implied an invasion of the jury into the province of the legislator. The latter is not easily compatible, nor is the complete separation of the historical from the normative easy in criminal procedure. On the other hand,

156. See Luciano Varela Castro, *El Enjuiciamiento de Ciudadanos por Ciudadanos. Algunas Prácticas Conformadas por una Jurisprudencia Abrogante*, in LA LEY DEL JURADO: PROBLEMAS DE APLICACIÓN PRÁCTICA, *supra* note 97, at 633 (indicating that a well-designed question list, and a judicial determination per Article 70 of the LOTJ-Spain that sufficient evidence exists to undermine the presumption of innocence should be sufficient justification for a guilty verdict).

157. Moos, *supra* note 3, at 77; Varela Castro, *supra* note 156, at 633 (indicating that a well-designed question list, and a judicial determination per Article 70 of the LOTJ-Spain that sufficient evidence exists to undermine the presumption of innocence should be sufficient justification for a guilty verdict).

158. *Schad v. Arizona*, 501 U.S. 624, 627 (1991).

there has been a constant reproach, due to the absence of reasons, of organized jury systems which allow citizens alone to return verdicts.

The law attempts to give a prudent response to both objections. On the one hand, because the act cannot be conceived from a reductionist naturalist perspective, but specifically and exclusively, only to the extent it is legally relevant. An act, in a concrete selection of its Protean accidental nature, is declared proved only to the extent that it legally constitutes a crime.

Not to allow the jury to take into consideration this inseparable link between the configuration of historical data and its normative consequence is, on the one hand, useless, because the trial has already informed it of the consequence of its decision as to the proclaimed truth and it will not be able to omit in its decision reference to the consequences of its presumably only factual verdict.

Moreover, with this separation is reproduced one of the main reasons for criticizing jury trials in our experience. The difficult articulation of the questions, with the exclusion of the proscriptive aspects of requiring legal education, produced constant debates as to the correctness of verdicts and judgments.

It was also necessary to choose between a system of a single response or a sequential articulation. The first formula fits better in a concept which is far from the full force and supremacy of the legality principle. There, where the jury can, even to the point of irresponsibility, substitute the generic and a priori criteria of the legislator with his own conception in a concrete case, the apodictic verdict does not require either articulation or reasons.

In our system, the jury should be subjected inexorably to the legislative mandate. And this arrangement may only be controlled to the extent that the verdict externalizes the course of the argument which motivates it.¹⁵⁹

Despite the guidance contained in the preface to the LOTJ-Spain, during the first few years of trial by jury in Spain, judges had great difficulty in articulating the question lists, and this was the main reason for reversals of jury judgments during those years.¹⁶⁰ To avoid question lists with irrelevant factual data, or questions composed of “fragmented facts,” judges who have tried jury cases, like Miguel Carmona Ruano, President of the Sevilla Provincial Court, have suggested that the questions should be “stripped to the essentials” and address all the elements of the charged “justiciable act.”

159. Explicación de Motivos, L.O.T.J., B.O.E. n. 122, May 22, 1995 at § V(1) (Spain).

160. For an exhaustive analysis of the question lists and the problems associated with it in the first year of Spanish jury trials, see Thaman, *Spain Returns*, *supra* note 15, at 320–53. Cf. Miguel Carmona Ruano, *El Objeto del Veredicto*, in PROBLEMAS DEL JUICIO ORAL CON JURADO, *supra* note 108, at 148 (noting that a significant portion of reversals is due to question list errors).

This can either be done in one single paragraph, i.e., one proposition or question in the verdict form, or in sequential questions.¹⁶¹

According to Carmona Ruano, the verdict form should be like a “draft judgment” which includes the theory of the public prosecutor, the private prosecutor, the defense, etc. and contains the factual determinations related thereto.¹⁶² One of the main authors of the jury law, Luciano Varela Castro, now a Supreme Court judge, felt that a properly drafted question list should clarify the proof of each element of the charged offenses.¹⁶³

If the verdict form could be tantamount to a draft judgment, one would not need the additional “reasons” required in the Spanish legislation. Indeed, a properly articulated question list was traditionally considered to constitute a sufficient factual foundation for the professional bench to write its judgment, especially if the bench performed its gatekeeping function properly by removing from the jury any cases which lacked sufficient incriminating evidence.

Thus, unlike the verdict in a murder trial in the United States, the special verdict in a Spanish murder case will contain a more substantial narrative of the facts the jury found to be true. An example, from a case based on direct evidence, including a confession of the defendant, can be seen in the first two questions found to be proved in the *Romero Contreras* case in Madrid Provincial Court.¹⁶⁴

1. Around 6:00 p.m. on Dec. 28, 2000, the defendant, Ildefonso Romero Contreras, in the dwelling on Calle Cayetano García, 14, in Torrelodones, stabbed Francisca Noemí Navarrete Contreras 18 times causing her death by massive loss of blood. (UNFAVORABLE FACT) **Proved. Unanimously**

2. The defendant, Ildefonso Romero Contreras, before stabbing Francisca Noemí Navarrete Contreras, stabbed her various times in the face, grabbed her by the neck, attempted to strangle her, which caused her to lose consciousness, which was exploited by the defendant to stab her 18 times in the back which caused her death (UNFAVORABLE FACT) **Proved. 8–1**

According to the “flexible” approach to the reasoned Spanish verdict, a well-executed question list, if based on sufficient incriminating evidence, could adequately justify a guilty judgment even when the additional jury reasons are minimal or merely conclusory. Once the judge accepts the factual findings of the jury, there should be little trouble writing the judgment,

161. *Id.* at 155–56.

162. *Id.* at 167.

163. Varela Castro, *supra* note 156, at 556.

164. See *infra* Appendix, for complete question list and reasons for the verdict.

for it was the judge that formulated the question list, and, if done properly, the answers to the factual questions should clearly indicate the crimes which the jury found to be proved.¹⁶⁵

In the words of Varela Castro:

[S]uch a sequential structuring of propositions without doubt facilitates the intellectual labor of giving reasons because it presupposes that they [the jury] stop mentally at each of the levels or structures of the facts in their sequential configuration to determine in which evidentiary elements the jury supports its decision, leaving a succinct note as to such explanation.¹⁶⁶

He continued by asserting that the “succinct reasons required by [Article] 61.1(d) [of the LOTJ-Spain] need not be interpreted to require exposition of reasons why the jury considered certain facts to be proved or not,” because “these can be found in the answers to the questions prepared by the presiding judge.”¹⁶⁷

In a direct evidence case, with a confession, such as *Romero Contreras*, above, the jury’s findings are apparent and presumably based on the confession and other direct evidence. However, in the *Wanninkhof* question list, the jury also affirmed a particular criminal narrative taken from the accusatory pleadings in that case, yet in such a circumstantial evidence case, there would be no way to determine from which evidence the jury based their affirmation of guilt. In *Taxquet*, however, the question list reveals no more facts than would a skeletal general verdict in the United States.

6. Post-Verdict Control of the Verdict

As noted above, Article 63(1) LOTJ-Spain allows the presiding judge to return a defective verdict form to the jury to repair omissions, contradictions among the guilt and factual questions, and other defects.¹⁶⁸ However the law does not give the judge express authority to return the verdict to the jury if its reasons are clearly insufficient. Some commentators, however, believe one can interpret either Article 63(1)(d) or (e) LOTJ-Spain to allow this,¹⁶⁹ and some Supreme Court rulings have adopted this interpreta-

165. VÉLEZ RODRÍGUEZ, *supra* note 28, at 210–11.

166. Varela Castro, *supra* note 156, at 568–69.

167. *Id.*

168. *See supra* note 94.

169. That is, under (d) “if the diverse pronouncements are contradictory, either between those relating to the facts which have been declared as proved, or between the guilt pronouncements and the declaration as to the facts proved” or under (e) “if some error has occurred in relation to the method of

tion.¹⁷⁰ At no time in the first year of jury trials did any judge return a verdict for this reason.¹⁷¹

The Constitutional Court, however, in its decision in the *Otegi* case, expressly held that the judge had no duty under Article 63(1) LOTJ-Spain to return the verdict to the jury to correct insufficient jury reasons (in that case for an acquittal), nor did the prosecutor or aggrieved party have to object to preserve the issue for appeal.¹⁷² Unfortunately, this ruling will allow judges to intentionally fail to guide the jury in its difficult task of justifying its verdict so that there will be a built-in error in case of an acquittal. Because the error has been deemed to be "plain error"¹⁷³ the prosecutor may also sit quietly and allow the error to remain uncorrected.¹⁷⁴

Another dispute in the Spanish literature relates to whether the trial judge, in the judgment, may interpret what are otherwise insufficient reasons and explain them in relation to the evidence adduced at trial to justify the verdict and head off a possible reversal. Some proponents of the flexible approach would allow the judge to do this, especially in a case where the jury's reasons were skeletal or conclusory in nature.¹⁷⁵ Opponents of this approach maintain, however, that this would allow the trial judge to substitute his reasons for those of the jury where, unlike in a mixed court,

deliberation or voting."Nomdedeu, *supra* note 100, at 806; VÉLEZ RODRÍGUEZ, *supra* note 28, at 171; LÓPEZ JIMÉNEZ, *supra* note 94, at 377.

170. De Paúl Velasco, *Presunción de Inocencia*, *supra* note 97, at 539 (listing cases). Judge Andrés Ibáñez in his *Wanninkhof* opinion, notes that the judge could have returned the verdict for the jury to correct the deficient reasons. S.T.S., March 12, 2003 (279/2003) at § 6.

171. Only once did a judge return the verdict when the jury completely forgot to give reasons for its decision. Thaman, *Spain Returns*, *supra* note 15, at 379–80.

172. S.T.C., Dec. 20, 2004 (B.O.E., No. 1063, p. 36, 41), available at <http://www.boe.es/boe/dias/2005/01/21/pdfs/T00036-00043.pdf> [hereinafter *Otegi* Constitutional Court Ruling].

173. *Id.*

174. I have written about how judges and prosecutors in Russia exploit the lack of a "raise or waive" rule by building in reversible error into cases to facilitate reversals of acquittals. Thaman, *Nullification*, *supra* note 15, at 370–75.

175. In a simple case in which anyone who was present at the trial would understand what a jury meant, when it said it relied on the "witnesses," De Paúl Velasco would allow the trial judge to elucidate, in the judgment, what those witnesses said, but not allow further interpretation of the evidence. De Paúl Velasco, *Presunción de Inocencia*, *supra* note 97, at 545. In S.T.S. 598/2001, decided on April 10, 2001, the court said that the jury's "succinct explanation" may be "complemented by the presiding judge, for the court, having paid attention to the development of the trial, must give reasons for the judgment in conformity with Article 70.2 LOTJ-Spain." Enrique Bacigalupo, *Problemas Jurisprudenciales de la Ley del Tribunal del Jurado*, in LEY DEL JURADO: PROBLEMAS DE APLICACIÓN PRÁCTICA, *supra* note 97, at 639, 671. For a list of similar Supreme Court decision, see Doig Díaz 2003, *supra* note 108, at 3. The Superior Court of Justice of the Madrid Community, in a ruling issued on October 28, 1998 concerning an appeal in a jury case, held that the presiding judge may "supplement the relative incapacity of the lay jury to give reasons for and explain in profundity the logical-legal process it followed to reach a decision of guilt or innocence." Carlos Almela Vich, *El Procedimiento del Jurado: Necesidad de la Reforma: Pautas de Interpretación*, 44 ACTUALIDAD PENAL 825, 835 (1999).

the judge would not have participated in the discussions and would not know what motivated their decision.¹⁷⁶

Thus in a decision of October 8, 1998, a panel of the Spanish Supreme Court held that the judge may not fill holes in the reasoning left by the jury:

[I]f one recognizes the possibility of such a cleansing, one falls into, on the one hand, an inadmissible fiction, given that the presiding judge does not know, because he was not present during the jury deliberations, the reasons which they expressed to declare proved or not the facts submitted to them; and, on the other hand, it denaturalizes the institution of the jury in the way that it was designed by the legislator, for an important decision of the judge of the facts would be given to the professional judge, which is in the exclusive competence of the lay judges.¹⁷⁷

7. The Sufficiency of Reasons for Convictions Based on Direct Evidence

In cases based on direct evidence, Spanish courts have generally required less rigorous reasons for decisions of guilt.¹⁷⁸ A “flexible approach” to jury reasons would have the jury only indicate the evidence upon which it relied, but not *why* it relied on the evidence, especially in a case based on direct evidence.¹⁷⁹ After all, this was the original approach to reasoned judgments in Germany and Spain.¹⁸⁰ An example of this approach can be found in a 2001 decision of the Spanish Supreme Court, where the court found it difficult “to expect a purified analysis of the distinct pieces of evidence and the reasoned synthetic evaluation of it in its totality” by a jury, but was satisfied that

the jury fulfills the duty of giving reasons with the enumeration of the pieces of evidence taken into consideration, in a way that it is possible to appreciate that the decision has a reasonable foundation in the knowledge of the facts obtained in the trial and is not the fruit of mere arbitrariness.¹⁸¹

176. *Id.* at 844.

177. VÉLEZ RODRÍGUEZ, *supra* note 28, at 140.

178. However, for a view that all evidence, even first-hand eyewitness testimony, is really “circumstantial” and the identification of a suspect is really, after all, a conclusion deduced from factors, such as memory of the person’s appearance, time elapsed, emotional aspects, etc. see PERFECTO ANDRÉS IBÁÑEZ, *PRUEBA Y CONVICCIÓN JUDICIAL EN EL PROCESO PENAL* 50 (2009).

179. Doig Díaz 2003, *supra* note 108, at 4.

180. See *supra* text accompanying notes 109–13.

181. VÉLEZ RODRÍGUEZ, *supra* note 28, at 193 (citing S.T.S., Jan. 29, 2001). This is also the approach of Supreme Court Judge Enrique Bacigalupo, in one of his decisions dated December 5, 2000. See Varela Castro, *supra* note 156, at 634–35. Former Constitutional Court judge Tomás Vives Antón also shares this view. Tomás Vives Antón, *La Presunción de Inocencia en la Ley del Jurado*, in *LEY DEL JURADO: PROBLEMAS DE APLICACIÓN PRÁCTICA*, *supra* note 97, at 436.

Even though the Constitutional Court in the case of *Moisés Macia Vega* imposed a demanding test for reasons for acquittals if the case was based on circumstantial evidence, it conceded that simple reasons might suffice in certain cases based on direct evidence:

[I]n those cases in which the fact submitted to the judgment of the jurors consists of an event which is simple in its genesis and development, in which the evidence presented and evaluated by them is that which we call direct and the propositions submitted for their consideration in the verdict form are simple to analyze both in number and content, the succinct explanation required by the law in relation to the accreditation of a certain fact, may consist in a global reference to the result of those pieces of evidence in a way that no further details would be required other than the indication of the one or more means of proof upon which they based their decisions as to the reality of what happened.¹⁸²

An even less rigorous approach, based still in the old notion of *intime conviction*, was voiced by another panel of the Supreme Court in 2002:

[W]hen one is dealing with a jury court, what one asks of the lay judges is not an evaluation based in the exercise of reason, which is what one demands of the professional judge, but a declaration of will on the basis of an evaluation in conscience of the evidence introduced.¹⁸³

While De Paúl Velasco is willing to adopt a flexible approach in direct evidence cases—which would allow the jury to just enumerate the sources of proof—involving a confession or several eyewitnesses, in other cases he would require that the jury concretize the “elements of proof” derived from the sources of evidence, their incriminating or exculpatory content and explain the reasons, even if in an elemental way.¹⁸⁴

8. The Sufficiency of Reasons for Convictions Based on Circumstantial Evidence

Before the LOTJ-Spain was enacted, the Constitutional Court issued a decision (aimed exclusively at professional judges at the time) in relation to

182. S.T.C., Oct. 6, 2004 (B.O.E., No. 19069, p. 82, 90) available at <http://www.boe.es/boe/dias/2004/11/09/pdfs/T00082-00092.pdf>.

183. VÉLEZ RODRÍGUEZ, *supra* note 28, at 193 (citing S.T.S., Feb. 28, 2002). Cf. Doig Diaz 2003, *supra* note 108, at 3.

184. De Paúl Velasco, *Presunción de Inocencia*, *supra* note 97, at 544. Judge Andrés Ibáñez, in the *Wanninkhof* decision, explains the difference between sources and means of proof:

[I]n the concept *source of evidence* is the subject who testifies; *means of proof*, the act of listening in an adversarial fashion to the testimony; and *element of proof* . . . , in its case, that which has been testified to which is deemed to be convincing, with a foundation, and serves to integrate the proved fact or rather as a basis for an ulterior inference.

S.T.S., Mar. 12, 2003 (279/2003) at § 4.

cases based on circumstantial evidence. It held that, to avoid “arbitrary, irrational or absurd” deductions, judges

should indicate, in the first place what are the proved pieces of circumstantial evidence and, in the second place, how one can deduce from them the participation of the defendant in the penal offense, in such a manner that any other court which intervenes after the fact can understand the judgment made as to the circumstantial evidence.¹⁸⁵

At the time the LOTJ-Spain was passed, some commentators felt that the requirement of reasons would only be difficult in circumstantial evidence cases.¹⁸⁶

In the *Wanninkhof* case, Judge Perfecto Andrés Ibáñez provided perhaps the most articulate formulation of the “demanding” test for jury reasons in circumstantial evidence cases. He first pointed out that the jury only named “sources of evidence” by enumerating the witnesses upon which it based its decision, but did not indicate how the testimony from these sources led them to deduce guilt, thereby making these circumstances into “elements of proof.”¹⁸⁷ He continued:

Due to these considerations, it is patent that the verdict of the jury in this case lacked reasons, for they do not relate the “elements of conviction” taken into account and do not contain more than a mere catalogue of means of proof, which explains nothing. The reference to that testified to by A,B,C, or D, without more precision, is like an imprecise and global remission, to the *testimony* or *what happened* in the trial. [The jury], not even having access to the file itself . . . could not form an idea as to what it wanted to say in expressing it in that way.

To this one must add the circumstance, that, there being no eyewitnesses to the death of the victim nor of the subsequent manipulation of the body, the testimonies heard by the jury have no direct relation to these facts, other than only being able to offer very indirect information in this respect, in terms which are not susceptible to presumption only through a mere reference to the source. This is why the jury should have concretized the *what* of what was said for each of the witnesses and experts which it used to, in a reasoned fashion, place the criminal action on the shoulders of the defendant and *why*. And it could have done this with a simple discourse, in colloquial terms, as each member of the court would

185. VÉLEZ RODRÍGUEZ, *supra* note 28, at 216 (citing S.T.C., (175/1985)).

186. Thus, Vicente Gimeno Sendra, then a judge of the Constitutional Court, opined that a jury would have difficulty following the doctrine laid down by the Constitutional Court, whereby the reasoning must show “an objective and logical nexus capable of exteriorizing a relation of causality between the plurality of believable circumstantial evidence and the proof of the principal criminal act.” VICENTE GIMENO SENDRA & JOSÉ GARBERÍ LLOBREGAT, *LEY ORGÁNICA DEL TRIBUNAL DEL JURADO: COMENTARIOS PRÁCTICOS AL NUEVO PROCESO PENAL ANTE EL TRIBUNAL DEL JURADO* 321 (1996).

187. *See supra* note 184.

have employed had they been interrogated orally as to their conviction, which, it is obvious, should exist and be subject to verbalization, given that there was a debate and a pronouncement in this respect. Thus, the least which the guarantee of reasons requires, in relation to that provided by § 61.1(d) LOTJ—which does not distinguish between different types of evidence—is this level of elemental exteriorization of its evaluation.

This court has been well conscious of the difficulties which the jury presents in the area of evaluation of the evidence and giving reasons for the judgment, especially when dealing with evidentiary situations which are particularly complex. And thus it has pronounced on distinct occasions in favor of a modulation of the requirement imposed by the imperative of Art. 120.3 Const. Spain But this cannot be situated below the minimum consistent in the identification—all the while indicating its source—*of the concrete elements of proof* taken into account to pronounce a judgment of conviction; to accompany this simple inventory with an *explication albeit elemental* of the *why* of the attribution to these of a determinate condemnatory value, as a mode of accrediting that the evaluation was not arbitrary. In effect, the individualization and the attribution of an exculpatory or inculpatory value to certain information is a very personal task which cannot be avoided by the jury as judge. And the recognition, at least, of these elements of the appreciation which they merited is the only thing which can allow the presiding judge to give reasons for the judgment with the necessary rigor, giving it coherence and sufficient explicatory quality.¹⁸⁸

To facilitate the jury's task in relation to cases based on circumstantial evidence, some commentators have discussed whether the special verdict or question list should include propositions as to whether each piece of circumstantial evidence had been proved, from which the jurors would deduce a possible finding of guilt. But the prevailing view, in this respect, is that it would excessively complicate the question list, and require the presiding judge to select which pieces of evidence to include in the list, thus indirectly revealing his or her opinions on what is potentially incriminating evidence.¹⁸⁹

A better suggestion has been to amend Article 54 LOTJ-Spain, the section dealing with instructions to the jury to require the giving of detailed instructions on how to deal with circumstantial evidence.¹⁹⁰

188. S.T.S., Mar. 12, 2003 (279/2003) at § 5.

189. Juan José López Ortega, *Hecho Material, Hecho Psíquico y Juicio de Valor en el Veredicto del Tribunal del Jurado*, in *LEY DEL JURADO: PROBLEMAS DE APLICACIÓN PRÁCTICA*, *supra* note 97, at 699, 707; Doig Díaz 2003, *supra* note 108, at 5; Doig Díaz 2005, *supra* note 125, at 8.

190. *Id.* De Paül Velasco already uses such an instruction, not only explaining to the jury how to evaluate circumstantial evidence, but also how to draft reasons based on it. De Paül Velasco, *Instrucciones*, *supra* note 108, at 225–27.

9. The Sufficiency of Reasons for Acquittals

From the time of the passage of the LOTJ-Spain in 1995, many commentators have maintained that requiring reasons for acquittals would violate the presumption of innocence.¹⁹¹ Others have felt that a well-conceived question list and the answers of the jurors in rejecting the proof of the constituent elements of the charged crimes should sufficiently reveal the jurors' reasoning process.¹⁹²

In the first years of the new jury trial system, juries who acquitted often merely indicated that the evidence had failed to convince them otherwise. Thus, in one of the first trials in Palma de Mallorca, in which bribery was charged, the jury attributed its acquittal to the fact that "the evidence presented did not convince the members of the jury that the facts were proved for which [the defendants] were accused." The jury continued, that "the declarations of the agents of the Guardia Civil, who did not agree in their testimony, caused some contradictions which gave rise to an element of important doubt for the members of the jury."¹⁹³ The jury in the *Otegi* case also merely said that the circumstances had been "deficiently proved" and that they harbored "doubts."

Many Spanish commentators feel that the expression of "doubt" in the minds of the jury should be sufficient to deem a fact, or guilt, not to have been proved. Thus, Supreme Court judge Enrique Bacigalupo stated in one opinion: "the expression of the doubt has the value of a legal foundation suitable to justify the pronouncement of the jury."¹⁹⁴

The Spanish courts clearly distinguish between the strength and clarity of the reasons given for a guilty verdict, and those required for a verdict of acquittal.¹⁹⁵ For instance, in one case which was heard on appeal by the Superior Court of Justice of Valencia, the jury gave the following reasons:

We consider the defendant not guilty of murder because the evidence presented during the trial led the jury to a state of doubt which was not resolved, considering the evidence presented to be circumstantial and not conclusive, thus, in face of doubt not dissipated and taking into account

191. Thaman, *Spain Returns*, *supra* note 15, at 372; Vives Antón, *supra* note 181, at 448.

192. Doig Díaz 2005, *supra* note 125, at 5.

193. I attended this trial, which was one of three trials that took place on May 27, 1996, the first day of trials under the new system. Thaman, *Spain Returns*, *supra* note 15, at 242, 371.

194. VÉLEZ RODRÍGUEZ, *supra* note 28, at 201 (citing S.T.S., Feb. 5, 2001). *See also* Bacigalupo, *supra* note 175, at 670–71.

195. For an opinion that the "reinforced reasons" required by the LOTJ-Spain should only be applicable in relation to guilty verdicts, see De Paúl Velasco, *Presunción de Inocencia*, *supra* note 97, at 544.

the presumption of innocence, this is why the decision of the jury is not guilty.¹⁹⁶

The appellate court upheld the acquittal, reasoning as follows:

These two declarations are a sufficient explanation of the reasons for which they declared not proved the acts affirmed by the prosecutors and which were formulated in the verdict form. Obviously the explanation could have been much more detailed, with a mention of each and every means of proof, but this possibility does not take away from the fact that they fulfilled the exigency of a "succinct explanation" required by the law. One cannot require of the jury the same precision as of professional judges and if they say there is no direct evidence, that all was circumstantial, and that it did not succeed in removing the doubt with respect to the participation of the accused in the acts, one must conclude that we are confronted with a succinct explanation.

If one needs to be more precise, one should say that it is not a case of the presumption of innocence not being undermined, but the application of the rule of *in dubio pro reo*. In effect, the presumption of innocence is decided in an objective manner and thus its undermining is based in the existence of evidentiary activity of an inculpatory nature, which can be determined by reviewing what took place at the trial, while the principle of *in dubio pro reo* centers on the evaluation of the evidence, which is something subjective, depending on the mind of he who has to decide. It is certain, that the consequence of both cases in the judgment is an acquittal, but in the one objectively due to lack of incriminating evidence and in the other subjectively for not having convinced the adjudicator.¹⁹⁷

This "flexible" approach taken in the Valencia case, however was rejected by the Spanish Constitutional Court in two decisions in 2004, the last being that of *Mikel Otegi*. The first case was that of *Moisés Macía Vega*.¹⁹⁸ The defendant was acquitted by a jury of aggravated murder in Alicante Provincial Court and the acquittal was overturned by the Superior Court of Justice of the Community of Valencia based on inadequate reasons. The Constitutional Court begins its review of the decision of the intermediate court of appeal by noting that it is completely clear that the jury wanted to acquit:

In the instant case, if one analyzes the record of the voting, one sees that the judgment is not absolutely arbitrary and deprived of all logic, but indicates that the jurors adopted a decision, following determinate criteria which are more or less explained in the record. It is more than evident that the constitutional petitioner was acquitted by the jury without any

196. Nomdedéu, *supra* note 100, at 796 (quoting T.S.J.C.V., May 17, 1999).

197. *Id.* at 797-98.

198. S.T.C., Oct. 6, 2004 (B.O.E., No. 19069, p. 82, 91).

type of doubt by unanimous vote of all the jurors except one. All of the questions which make reference to his participation in the criminal act were answered without any doubt, without their being any type of contradiction in the answers. It is completely evident that the Jury Court wanted to acquit the constitutional petitioner of the crime of aggravated murder of which he was accused.¹⁹⁹

The court then distinguished between the reasoning required for convictions and acquittals:

Certainly the reasoning of judgments per Art. 120 (3) [of the Constitution of Spain] is “always” required, independently of whether they are of convictions or acquittals. Nevertheless it must be emphasized that in judgments of conviction the canon of reasoning is more rigorous than with acquittals for, according to a repeated constitutional doctrine, when other fundamental rights are at play—and, among those, when the right to liberty and the presumption of innocence are implicated—the requirement of reasons acquires particular intensity and thus we have reinforced the required canon [citations omitted]. On the contrary, with judgments of acquittal, the same fundamental rights are not implicated as are in convictions One cannot understand, thus, that a judgment of acquittal can be limited to pure decisionism of the acquittal without taking account of the *why* of it, which, while not affecting other fundamental rights, as occurs in the parallel case of judgments of conviction, would be in any case contrary to the general principle of the prevention of arbitrariness.²⁰⁰

But, despite the clear will of the jury to acquit, the court then refers to the complexity of the circumstantial evidence, nothing that the case was:

complex in its origin and execution, where, moreover, a plurality of persons have possibly participated in its commission with a varying division of roles among them and their declarations are not consistent with each other, nor with what each of these persons said at other times during the procedure and when the incriminating evidence offered is not direct, but circumstantial and quite varied, one cannot treat reasons as sufficient which consist in a simple referential mention of some means of investigation or proof, but it remains absolutely necessary to explain, even if in an elemental and succinct manner, why one accepts some declarations and reject others, why one attributes greater credibility to some over others, why one prefers one statement made in the police station to others made at trial, and that a part or parts of different contradictory declarations of the defendants should prevail and why over the rest.²⁰¹

199. *Id.* at 83.

200. *Id.* at 89.

201. *Id.* at 90.

In conclusion, the court noted that the jury only gave reasons for seven of the forty-nine questions they answered, admittedly those going to the identification of the defendant as author of a crime for the commission of which three of the defendants were convicted.²⁰²

The President of the Constitutional Court, María Emilia Casas Baamonde, joined by two other justices, dissented, and noting at first that the reasons given by the jury for its *verdict* are different than those demanded of judicial *judgments*:

The “reasons given” for the judgment and the “succinct explanation” required in the verdict are not and cannot be equivalent concepts for they refer to distinct realities (the first, essentially legal and the second exclusively factual, for it is the exclusive function of the jury to determine the facts which are to be considered proved as a result of the evaluation of the evidence for which only the jury is competent) and are directed to organs of a very different nature (the professional judicial sentencing organ and the lay jury). As to the jury’s verdict one may not, thus, require the canon of reason-giving of Art. 120(3) Const. Spain as one does for the judgment of a professional judge, for this would presuppose the denaturalization of the institution of the jury as a form of participation of the citizens in the administration of justice (Art. 125 Const. Spain), who are called only to decide as to the facts, and to fail to recognize the actual logic of the verdict which they return.²⁰³

The President of the Court noted that the presiding judge may not interfere in the fact-finding of the jury, but may return the verdict to the jury if the reasons are deficient:

In sum, what the law requires is that the verdict should be explained in a succinct manner to the point that, if the explanation legally required is defective because insufficient or arbitrary, the presiding judge can and should return the verdict to the jury (§ 63(1)(a) LOTJ). As to what should be done at judgment, § 70(1) LOTJ establishes that “the presiding judge proceeds to pass judgment in the form required by § 248(3) LOPJ, including, as proved facts and crime which is the object of the conviction or acquittal, the corresponding content of the verdict,” ordering that “if the verdict was guilty, the judgment should concretize the existence of incriminating evidence required for the constitutional guarantee of the presumption of innocence” (§ 70(2) LOTJ). Only in this case does the LOTJ require an exteriorization in the judgment of the incriminating evidence required, as the cited legal rule says, due to the constitutional guarantee of the presumption of innocence (Art. 24(2) Const. Sp).

202. *Id.*

203. *Id.* at 91 (Casa Baamonde, dissenting).

Finally, the President of the Court deemed that requiring a jury to externalize their reasons for acquitting violated the presumption of innocence:

When one is dealing with judgments of acquittal, to demand an exteriorization of the reasons for finding the existence of evidence sufficient to declare innocence presupposes an inversion of the understanding of the fundamental right to a presumption of innocence. It is guilt which must be proved, not innocence, and when it is not done, the defendant is presumed innocent, it being the constitutional burden of the prosecution to present evidence of the guilt of the accused and it is sufficient for the trier of fact to acquit based on reasonable doubt as to the sufficiency of the incriminating evidence necessary for a conviction. Neither the Constitution nor the LOTJ require the existence of sufficient evidence to justify the innocence of the defendant. And, as a result, the trier of fact has no duty to exteriorize his decision in relation to this evidence.²⁰⁴

In taking up the *Otegi* appeal, the Constitutional Court relied on its opinion in *Macía Vega* in holding that the mere assertion of “doubt” by the jury was insufficient.²⁰⁵ The Court discusses the question list in the case²⁰⁶ and reproduced the opinion of the Superior Justice Court of the Basque Country with which it agreed:

The requirement of a succinct explanation by the jury does not necessarily have to consist in a detailed and minute criticism of the internal psychological process which led to the proof, or lack thereof of the facts in question, for this would exceed the level of knowledge and diligence which one can expect and demand from the members of the jury. But they may not limit themselves to the concise affirmation that, being present during the totality of the evidence-taking, they abstain from any further precision, simply stating they are insufficient. The duty to give reasons can only be deemed fulfilled, if “considering each of the facts, the jury limits itself to unequivocally individualizing the evidence and any other element of proof the psychological impact of which persuaded or induced them to admit or reject the historical version of the respective events.”

[I]n the instant case they have not fulfilled this burden of giving reasons, inasmuch as the reading of the verdict shows that not one of the 91 facts which—divided in favorable and adverse to the interests of the defendant—were included in this document, revealed even a minimal explanation of the reasons why the jury considered them to be, in successively, proved or not.

204. *Id.* at 91–92.

205. S.T.C., Dec. 20, 2004 (B.O.E., No. 1063, p. 36, 40).

206. See *supra* Part III.D.2, for an edited version of the question list.

[T]he lack of any explanation as to the proof of the facts cannot be supplemented by the logical force of the connection of the answers which only affirm or negate the historical reality of the events, for it is necessary to add the reasons which explain the acquisition or consolidation of this conviction.²⁰⁷

The court finally repeats and affirms the words of the appellate court, that

the “invocation of doubt and appeals to the requirements of the law” add nothing to the absence of reasons for “they do not explain the way in which the doubt arose nor its extent, nor does one have the least idea of the efforts made to overcome it and clear up the difficulties it provoked.”²⁰⁸

Had the Constitutional Court adopted the “flexible” approach and analyzed the answers given by the jury to propositions in the verdict form in light of the evidence adduced at trial, the acquittal would likely have been upheld. Spanish law permits a defense of temporary insanity if one’s mental faculties are completely annulled either through voluntary intoxication or mental illness.²⁰⁹ The jury clearly found that this was the case as can be seen from their answers to questions 69 and 70, and 76 and 77.²¹⁰

CONCLUSION

The *Wanninkhof* case is a classic example of how an innocent person can be convicted of murder by a jury through a combination of dishonest and unethical conduct by the police and prosecution, passive and ineffective judges and ineffective assistance of counsel, coupled with a hysterical media witch-hunt atmosphere. The higher Spanish courts were able to overturn the unjust judgment by reviewing the inadequacy of the jury’s reasons and simultaneously, the glaring insufficiency in the evidence.

Since 1989, 266 innocent persons have been exonerated in the U.S. by the use of DNA testing after having been convicted—nearly always by juries—in trials which were otherwise “fair” in the sense that the judgments were not overturned on any legal grounds by the higher courts. These innocent persons served an average of thirteen years in prison.²¹¹ Since 1976, more than 130 persons sentenced to death for murder have been exone-

207. S.T.C., Dec. 20, 2004 (B.O.E., No. 1063, p. 36, 41).

208. *Id.*

209. Thaman, *Europe’s New Jury Systems*, *supra* note 16, at 341.

210. *See supra* Part III.D.2.

211. *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Mar. 18, 2011).

rated, seventeen of them through DNA testing and the rest through other means.²¹² The reasons for the miscarriages of justice are myriad: faulty eyewitness identification, unvalidated or improperly conducted forensics, misconduct by forensic experts, police and prosecutors, the use of dishonest snitches and undercover informants, false confessions and ineffective assistance of counsel.²¹³

Perhaps it is time for the United States and other common law countries to consider requiring juries to return special verdicts and perhaps even to give reasons when they consider convicting someone, especially for a felony which could result in long-term imprisonment or death.²¹⁴ In January of 2001, Lord Woolf, the Lord Chief Justice of England wrote:

I recognize that although I want to retain our [jury] system and would not wish it to be damaged in any way, that it can result in disadvantages—not only for the public but also for those who come before juries. . . . Just as judges can be fallible, so can juries, and without a reasoned decision it is often difficult to know if the jury has made a mistake or not.²¹⁵

Although special verdicts are frowned upon in the United States because they are considered to guide juries excessively in reaching a certain result,²¹⁶ they are not foreign to Anglo-American jury traditions. Indeed, one of the most famous jury cases ever tried, the cannibalism case of *Dudley & Stephens*,²¹⁷ was based on a lengthy “special verdict” issued by the jury upon which the bench based its decision.²¹⁸ The court rules of some states also allow special verdicts in certain circumstances.²¹⁹

I also believe that judges in the United States should be required to assess the strength of the evidence in all serious felony cases, whether or not a motion for a directed verdict of acquittal has been made by the defense,

212. David Grann, *Trial by Fire*, NEW YORKER, Sept. 7, 2009, 42, at 54.

213. *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand> (last visited Mar. 18, 2011). See also STATE OF ILLINOIS, COMMISSION ON CAPITAL PUNISHMENT: REPORT (April 2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html [hereinafter ILLINOIS COMMISSION].

214. For a similar suggestion, see Jackson, *supra* note 44, at 517–20.

215. *Id.* at 477.

216. See *supra* note 17.

217. Regina v. Dudley & Stephen [1884] 14 Q.B.D. 273 (U.K.), available at <http://www.justis.com/data-coverage/iclr-bqb14040.aspx>.

218. *Id.*

219. Rule 49.01 of the Kentucky Rule of Criminal Procedure allows “special verdicts” but they should be used sparingly. Commonwealth v. Durham, 57 S.W.3d 829, 830–37 (Ky. 2001) (the case also cites to the ancient roots in English law of special verdicts); State v. Hill, 868 A.2d 290, 300–01 (N.J. 2005) (so jury may distinguish between first degree murder and felony murder). Kate H. Nepveu, *Beyond “Guilty” or “Not Guilty”: Giving Special Verdicts in Criminal Jury Trials*, 21 YALE L. & POL’Y REV. 263 (2003) (advocating using special verdicts in certain cases).

and that this decision should be subject to appeal to the higher courts. This would force trial and appellate judges to look long and hard at the evidence underlying serious felony convictions and to develop more stringent criteria for what kinds of evidence can support such a conviction.

I disagree, however, with my friend, Perfecto Andrés Ibáñez, and others in Spain who support the giving of “demanding” reasons, such as might be required of professional judges either sitting alone or in a mixed court. As one panel of the Supreme Court noted:

To demand extreme rigor in the reasoning of the jury’s verdict, thus causing repeated reversals of its decisions, with the subsequent repetition of the trials which leads to an unavoidable negative effect on constitutional rights and the effective judicial protection and of a speedy trial, can constitute, under the cloak of an apparent hyper-due process approach, the actual expression of an anti-jury animosity which can make the functioning of the system impossible as it was conceived by the legislator. An equilibrium must be sought between the constitutional rights implied in pondering the sufficient reasoning or the rationality of the decision with the model of justification, skeletal and without a necessity of artificiality, which a jury can formulate.²²⁰

When it comes to giving reasons for acquittals, I agree with the President of the Constitutional Court, María Emilia Casas Baamonde, that jurors should not have to justify a verdict of not guilty, because it violates the presumption of innocence.²²¹ The presumption of innocence should not be considered to be a mere objective test of the presence of *some* incriminating evidence, as it appears to be in the Spanish jurisprudence,²²² but should be seen as being inextricably intertwined with the notion of *in dubio pro reo* and the necessity of proof beyond a reasonable doubt as it is in the United States. The defendant need not *disprove* potentially incriminating evidence: it is up to the prosecutor to prove its credibility and relevance beyond a reasonable doubt.

I also disagree that acquittals should be accompanied by reasons so that the judgment will be comprehensible to the general public, the victim

220. Doig Díaz 2003, *supra* note 108, at 3 (quoting S.T.S., Sept. 11, 2000). While De Paúl Velasco admits that Andrés Ibáñez’s “cognitive” approach is the only way to avoid boilerplate reasoning, he believes that it is unworkable in jury trials and that a more pragmatic approach is necessary. De Paúl Velasco, *Presunción de Inocencia*, *supra* note 97, at 542–43. On the requirement of “reasons” as allowing professional appellate judges to throw out any decisions of which they do not approve, see De la Oliva Santos, *supra* note 127, at 470. On claiming that the requirement of reasons was the first “intellectual conquest for the partisans of the mixed court” because it requires the tutelage of legally-trained lawyers or judges, see LÓPEZ JIMÉNEZ, *supra* note 94, at 357.

221. See *supra* text accompanying note 203.

222. See *supra* Part III.D.4.

or aggrieved party, or the public prosecutor.²²³ The appealability of acquittals²²⁴ presumes, at the outset, that the prosecuting parties (public prosecutor and victim or aggrieved party acting as civil parties or private prosecutor), have protected rights to due process in criminal cases similar to those enjoyed by defendants.²²⁵ Although the rights of victims in criminal proceedings have been recognized by the Council of Europe²²⁶ and in many European constitutions and codes of criminal procedure,²²⁷ I believe that if an acquittal in a criminal case can be overturned because the victim's due process rights were violated,²²⁸ or because a paucity of reasons makes it difficult for them to understand why the jury had a reasonable doubt, prosecutors and judges can exploit this situation to invalidate decisions with which they do not agree, and even collude to violate the rights of victims to achieve this purpose.²²⁹

The decision of the ECtHR Grand Chamber in *Taxquet*, has emphasized that it is taking a "flexible" and not a "demanding" approach in making jury verdicts of guilt more justifiable. In the absence of a requirement of jury reasons, other safeguards could suffice:

Such procedural safeguards may include, for example, directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced . . . and precise, unequivocal questions put to the jury by the judge, forming a framework on which the verdict is based or sufficiently offsetting the fact that no reasons are given for the jury's answers Lastly, regard must be had to any avenues of appeal open to the accused.²³⁰

Thus, while Belgium reacted immediately to the first *Taxquet* decision by implementing a requirement of jury reasons and is already gaining expe-

223. This has been articulated as an express purpose of the requirement of reasons per Article 120(3) of the Spanish Constitution.

224. Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2(1), Nov. 22, 1984, 1525 U.N.T.S. 195, ETS No. 117. Protocol 7 ECHR guarantees the right to appeal only to "everyone convicted of a criminal offence."

225. For an argument supporting the idea of the prosecutor's due process rights to know why his or her evidence was not accepted, and of the "public's" right to know why the jury ruled as it did, see Moos, *supra* note 3, at 77.

226. Council Framework Decision of March 15, 2001 on the standing of victims in criminal proceedings, 2001 O.J. (L 82) 1.

227. On the role of the victim as civil party or private prosecutor in continental European criminal proceedings, see THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 14, at 23–27.

228. The Spanish Constitutional Court has denied that victims or the state have due process rights, but the Spanish Supreme Court has recognized such a possibility. See Vives Antón, *supra* note 181, at 443–47, who disagrees with the notion of due process rights for prosecutor and victim.

229. I have documented how this is routinely done in Russian jury cases to overturn acquittals. Thaman, *Nullification*, *supra* note 15, at 370–75.

230. *Taxquet* (GC), *supra* note 2, at § 92.

rience in this area,²³¹ the Norwegian Supreme Court interpreted the first *Taxquet* decision as not requiring it to change its system, holding that

the questions put to the jury are “specific and individual” and are explained by the presiding judge; the applicable legal principles are explained to the jury and the evidence is summed up; and the professional judges can review a guilty verdict and set it aside if they find that “insufficient evidence of guilt has been produced.”²³²

Even common law Ireland was scared by the first *Taxquet* decision and one judge proposed, in a notorious murder case, that the jury give reasons, but the judge changed his mind when both prosecutor and defense objected.²³³

If reasons were to be required of the jury, the legislature would have to determine the most effective way of ensuring that they will correctly reflect the deliberations of the jury and, to the least extent possible, interfere with the jury’s autonomy. The jury could invite the presiding judge into chambers to aid them in drafting the reasons. This was the solution adopted in 2009 in Belgium following the first *Taxquet* decision. The problem here, as was pointed out by Reinhard Moos, is that the judge may bring his or her reasons to bear on the jurors and thereby undermine their autonomy, thus making the proceeding look more like that of a mixed court.²³⁴

The clerk of the court, who, in Europe, is legally educated, could be called in to aid the jury as is done in Spain. Or another lawyer, or a notary, unconnected to the court and otherwise not participating in the deliberations, could just make sure that the reasons passed appellate muster.²³⁵

Tom Daly, the Executive Legal Officer to the Chief Justice of Ireland, issued the following challenge after the first *Taxquet* decision in 2009 and before the 2010 ECtHR Grand Chamber decision: “The trauma of *Taxquet* should shake the easy complacency regarding the merits of the Irish mode of jury trial, open our eyes to the wider world and, at the very least, kick start a meaningful reform process to address the various deficiencies that have been identified over the years.”²³⁶ Although the United States is not bound by *Taxquet*, of course, our own epidemic of wrongful convictions by

231. In October 2009, the court of Assizes in Arlon, Belgium, for the first time required juries to give reasons for their verdict in a murder case. It required the juries to explain each answer, whether affirmative or negative, to a list of seventy-six questions concerning the evidence, pleas, and elements of the dossier. Tom Daly, *An Endangered Species? The Future of the Irish Criminal Jury System in Light of Taxquet v. Belgium*, 20 IRISH CRIM. L. J. 34, 36 (2010).

232. Daly, *supra* note 231, at 36 (citing A. v. The Public Prosecution, Norges Høyesterett June 12, 2009 (HR-2009-01192-) (Case No. 2009/397) (Nor.)).

233. On the *Lillis* case, decided on Feb. 10, 2010, see *id.* at 36.

234. Moos, *supra* note 3, at 81.

235. *Id.* at 82–83.

236. Daly, *supra* note 231, at 40.

juries in serious, and sometimes capital, rape and murder cases should shake us out of a similar complacency and give us cause to think about ways to improve the quality of our jury's guilt-decisions without undermining the classic jury system as it exists in the United States.

I am not prepared to offer a clear legislative package to deal with this serious problem, but will conclude with a few ideas. First, I think that we should require the trial judge in all serious felony jury trials to issue an affirmation, with reasons, of why the evidence adduced in the case is sufficient, if believed by the jury, to prove guilt beyond a reasonable doubt in the mind of a reasonable juror. I would go a step further than the Spanish, interpreting Article 70 LOTJ-Spain, and also require the judge to weigh the sufficiency of the evidence, and, in cases based on circumstantial evidence, indicate the facts, which if proved beyond a reasonable doubt, could lead to inferences of guilt beyond a reasonable doubt.²³⁷ Second, I believe that when the theory of guilt is based on one of the types of evidence most susceptible to error, such as uncorroborated eyewitness identification, testimony of jailhouse informants, disputed expert testimony or uncorroborated and withdrawn confessions, the trial judge should indicate in the jury instructions why these types of evidence are credible, and instruct the jury to consider such evidence with caution.²³⁸ An option would be to allow a defense request for the jury to issue a special verdict or even give the reasons why it felt certain potentially suspect evidence was proved, and how they deduced guilt from such evidence.²³⁹ In the event of a guilty verdict, the reasons could be discussed and the jury could be polled as to whether they agree with the reasons stated in the verdict, or announced by the foreperson.²⁴⁰

237. See Judicial Counsel of California Criminal Jury Instructions (2011), No. 224 Circumstantial Evidence: Sufficiency of Evidence, available at http://www.courtinfo.ca.gov/jury/criminaljuryinstructions/calcrim_juryins.pdf.

238. See Recommendation 57 in ILLINOIS COMMISSION, *supra* note 213, at 141.

239. Thus in such circumstantial evidence cases, like *Wanninkhof*, a more demanding verdict could be elaborated.

240. On polling the jury in cases of guilty judgments, see LAFAVE ET AL., *supra* note 17, at 1189.

APPENDIX

Jury Case 18/2002. Case of Idelfonso Romero Contreras (Judge Juan José López Ortega)**VERDICT FORM**

1. Around 6:00 p.m. on Dec. 28, 2000, the defendant, Ildefonso Romero Contreras, in the dwelling on Calle Cayetano García, 14, in Torrelo-dones, stabbed Francisca Noemí Navarrete Contreras 18 times causing her death by massive loss of blood. (UNFAVORABLE FACT): **Proved: Unanimous.**

2. The defendant, Ildefonso Romero Contreras, before stabbing Francisca Noemí Navarrete Contreras, stabbed her various times in the face, grabbed her by the neck, attempted to strangle her, which caused her to lose consciousness, which was exploited by the defendant to stab her 18 times in the back which caused her death (UNFAVORABLE FACT) **Proved. 8-1.**

3. Ildefonso Romero Contreras was in a sentimental relationship with Francisca Noemí Navarrete Contreras, with whom he lived for several years. (UNFAVORABLE FACT): **Proved. Unanimous.**

4. Idelfonso Romero Contreras attacked Francisca Noemí Navarrete Contreras and killed her knowing that she wanted to separate from him, which frustrated the expectations he had of moving with her from his country of origin to Spain which provoked in the defendant a state of anger which obfuscated his conscience to the point of excusing him in part for his behavior. (FAVORABLE FACT). **Not proved: 7-2.**

5. Idelfonso Romero Contreras, after killing Francisca Noemí Navarrete Contreras, went to Galapagar, where, at 12:15 a.m. on Dec. 29, 2000, turned himself in to the patrol agents of the Local Police, telling him what had happened before the body of Noemí had been found. (FAVORABLE FACT). **Proved. Unanimous.**

6. The defendant, Ildefonso Romero Conteras, is guilty of having killed Francisca Noemí Navarrete Contreras in the form described in propositions 1, 2, 3 and 4? (UNFAVORABLE FACT). **Guilty: Unanimous.**

VERDICT REASONS

Page 1: We base, as to Question 1, which was proved. Because at trial on November 14, page 2, Police with badge number 100 stated: "The defendant told us he killed his wife in the afternoon. That at first he wanted to strangle her, then he stabbed her." We also base it in the testimony of Nov. 13, page 3, last paragraph, where he said: "From the first moment he admitted that he committed the homicide."

Page 2: We base Question 2, which we found proved, because at trial on Nov. 15, on page 4, Doctor Agundez said: "There were no signs of defense." Because the amount of wounds which are parallel show that the victim was not moving (pag. 9).

Criteria which jury shares:

Declarations of Cecilia: On Nov. 14, page 13: "Noemi told her that the defendant had a scar on his forehead because in Ecuador he tried to beat her and she scratched him and said that no man was going to lay a hand on her. Noemi was afraid of him. Because of this we believe that had she been conscious, she would have defended herself."

Page 3: We base Question 3, which we found proved, because Idelfonso Romero Contreras himself in his statement on page 2 stated: "We were together like a real couple. He knew her since August 1998."

Moreover, at trial on Nov. 14, page 2, when his lawyer asked him "On the day after returning from his vacation he decided to stay with her and to live in her house."

Page 4: We base Question 4, which is not proved:

First: "At trial on Nov. 15, Doctor Carrasco, on page 3, said: "In this case he suffers from no disturbance which neither due to its nature or intensity played a role during the commission of the acts."

Second: On page 172 of the Medical Report made by Dr. Carrasco and Dr. Agundez on May 7, 2001, says: "Our opinion is that at the time of the crime for which he is charged, there existed no psychopathological circumstances, indications of anomaly, alteration or psychic disturbance with a nature or sufficient intensity to modify his comprehension of the acts or his ability to act in conformity with this comprehension."

Page 4: We base Question 4, which is a proved fact:

First: That he killed when he found out that she wanted to separate from him and we base it in the trial on Nov. 13, pag. 2, when the defendant said: "Cecilia told me that Noemi left because she wanted to separate from me."

Second: And on the same date, on page 3, we base it in: "She told him she left, she was angry with him, and that she had been thinking about it for some time."

Third: We also base it in the same trial date, page 3: When the defendant said: "What bothered him most was that she wanted to abandon him and leave him alone."

Fourth: We also base it in the testimony of Nov. 14, page 5, when the defendant said: "It was not just, he left everything in his Country. All was twisted. She wanted to separate. The sexual relation changed when they came here. Noemi changed completely upon arriving here. In Ecuador there were arguments, 2 or 3 times she separated from him, put it was different. Here Noemi underwent a change. She became an unknown person for me."

Fifth: We base our decision in page 2 of trial on Nov. 15, in which Doctor Carrasco Gomez said: "At the time of understanding what could occur, he could have been in an emotional and passionate state, which is all there could be to find such a motive. They couldn't find any other pathology other than emotions, jealousy, frustration, etc. It does not reach a pathological level but belongs to psychologically frequent reaction."

Even with all the other expressed reasons, with 7 votes in favor and 2 against the jury considered not proved that the state of anger obfuscated his conscience and partially excuses his guilt.

Page 5: As to Question 5, which is proved, we base ourselves in

First: Because the police testified, on Nov. 14, page 9, "they went down Calle Soberania and were called by 3 persons, and one said he killed his wife, and this person was the accused."

Second: Because on the same day, at page 16, the witness Mariela Antoñeta Ramírez Zamora said: "That when leaving, we saw the police pass by, they stopped and they said that this gentleman wanted to tell them something."